(1) Supreme Court, U.S.
FILED

No. 99-2092 JUN 27 2000

OFFICE OF THE CLERK

In The

Supreme Court of the United States

RICHARD M. DICTER, M.D.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

WESLEY MACNEIL OLIVER*
6329 Freret Street
New Orleans, LA 70118
(504) 862-8810

**Counsel of Record*

79pp

QUESTION PRESENTED

Whether principles of federalism and statutory construction preclude forfeiture of a state-issued medical license as "property" under the Comprehensive Drug Abuse Prevention and Control Act of 1970, as amended, 21 U.S.C. § 853.

LIST OF PARTIES

Petitioner, Richard M. Dicter, M.D., was a defendant in the District Court and the appellant in the Court of Appeals. Respondent, who was the plaintiff in the District Court and the appellee in the Court of Appeals, is the United States. The National Association of Criminal Defense Lawyers was amicus curiae in the Court of Appeals.

TABLE OF CONTENTS

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT 2

A. The Criminal Offense 2

B. The Forfeiture Proceeding 3

C. The Court of Appeals' Ruling 5

REASONS FOR GRANTING THE WRIT 6

I. THE ELEVENTH CIRCUIT'S EXPANSIVE INTEPRETATION OF THE REACH OF FEDERAL CRIMINAL FORFEITURE RAISES SUBSTANTIAL CONSTITUTIONAL CONCERNS 8

A. The Courts of Appeals are Divided on Whether a Federal Court May Revoke Or Order the Revocation of a State-Issued License. 9

TABLE OF CONTENTS – Continued

B. A Physician's Procedural Due Process Rights May Well Be Violated by Federal Forfeiture of his Medical License 14

II. CONGRESS DID NOT INTEND CRIMINAL FORFEITURE TO BE A PROCESS FOR REVOKING STATE-ISSUED MEDICAL LICENSES 17

A. The Courts of Appeals are Divided on Whether Due Process Protection from Arbitrary Deprivation Defines a License as Property in Federal Criminal Statutes 17

1. The Nature of the Split 19

2. The Issues Unresolved by *Cleveland* 22

3. A Strictly Construed Interpretation of Property 24

B. The Forfeiture Power was Designed to Seize Transferable Sources of Wealth and Power 25

CONCLUSION 28

TABLE OF AUTHORITIES

CASES:

Alden v. Maine, 527 U.S. 706 (1999) 13

Bates v. State Bar of Arizona, 433 U.S. 350 (1972) 13

Barsky v. Board of Regents, 347 U.S. 442 (1954) 15

Bell v. Burson, 402 U.S. 535 (1971) 18

BFP v. Resolution Trust Corp., 511 U.S. 531 (1994) 17

Borre v. United States, 940 F.2d 215 (7th Cir. 1991) 18

Caplin & Drysdale, Chartered v. United States,
491 U.S. 617 (1989) 26

Carpenter v. United States, 484 U.S. 19 (1987) 18, 20

Cleveland v. United States,
120 S.Ct. 1416 (2000) 7, 22, 23

Garcia v. San Antonio Metro. Transit Authority,
469 U.S. 528 (1985) 12

Head v. New Mexico Board of Examiners in Optometry,
374 U.S, 424 (1963) 13

Jones v. United States, 120 S.Ct. 1904 (2000) 8, 17

Leakey v. Georgia Real Estate Comm.,
55 S.E.2d 818 (Ga. 1949) 6

Linder v. United States, 268 U.S. 5 (1925) 13

TABLE OF AUTHORITIES – Continued

Mathews v. Eldridge, 424 U.S. 319 (1976) 14

McBoyle v. United States, 283 U.S. 25 (1931) 24

McNally v. United States, 483 U.S. 350 (1987) 18

Morrissey v. Brewer, 408 U.S. 471 (1972) 14

National League of Cities v. Usery,
426 U.S. 833 (1976) 12

Rehman v. California, 85 S.Ct. 8 (1964) 7, 14-15

Semler v. Oregon State Board of Medical Examiners,
294 U.S. 608 (1935) 13

Toulabi v. United States, 875 F.2d 122
(7th Cir. 1989) 21

United States v. Best,
573 F.2d 1095 (9th Cir. 1978) 9, 12, 13, 15

United States v. Cutter, 58 F.3d 825 (2d Cir. 1995) 10

United States v. Dicter, 198 F.3d 1284
(11th Cir. 1999) 5-6, 7, 9, 10

United States v. Evans, 844 F.2d 36 (2d Cir. 1988) 20

United States v. Granberry, 908 F.2d 278
(8th Cir. 1990), *cert. denied,*
500 U.S. 921 (1991) 22-23, 25

United States v. Kato, 878 F.2d 267 (9th Cir. 1989) 7, 21

TABLE OF AUTHORITIES – Continued

United States v. Knotts, 722 F. Supp. 1365 (E.D. Va. 1989), reconsideration denied by 726 F. Supp. 975 (E.D. Va. 1998) 9

United States v. Lester, 85 F.3d 1409 (9th Cir. 1996) 18

United States v. Lewis, No. 86-5103, 1987 WL 35966 (6th Cir. 1987) 6, 10

United States v. Lopez, 514 U.S. 549 (1995) 8

United States v. Martinez, 905 F.2d 709 (3d Cir.), *cert. denied*, 498 U.S. 1017 (1990) 7, 19

United States v. Martinez, 988 F. Supp. 975 (E.D. Va. 1998) 10

United States v. Murphy, 836 F.2d 248 (6th Cir.), *cert. denied*, 488 U.S. 924 (1988) 7, 21

United States v. Pastore, 537 F.2d 675 (2d Cir. 1976) 9, 11, 14

United States v. Rubin, 559 U.S. 975 (5th Cir. 1977), *judgment vacated*, 439 U.S. 810 (1978) 26

United States v. Salvatore, 110 F.3d 1131 (5th Cir.), *cert. denied*, 521 U.S. 981 (1997) 7, 19

United States v. Schwartz, 924 F.2d 410 (2d Cir. 1991) 18, 20

United States v. Shotts, 145 F.3d 1289 (11th Cir. 1998), *cert. denied*, 525 U.S. 1177 (1999) 18

TABLE OF AUTHORITIES -- Continued

United States v. Sterber,
846 F.2d 842 (2d Cir. 1988) 6, 9, 11

United States v. Snyder,
852 F.2d 471 (9th Cir. 1988) 6, 9, 12

United States v. Yazell, 382 U.S. 341 (1965) 18

STATUTES AND LEGISLATIVE HISTORY:

Cal. Veh. Code § 13363 13

Ga. Code Ann. § 43-34-21 16

Ga. Code Ann. § 43-34-24 27

Ga. Code Ann. § 43-34-37 16

Ga. Code Ann. § 43-34-38 15

18 U.S.C. § 3231 3

21 U.S.C. § 853 ..... passim

H. R. Rep. No. 98-1030, *reprinted in* 1984
U.S.C.C.A.N. 3182. ..... 17, 25, 27

TABLE OF AUTHORITIES -- Continued

SCHOLARLY ARTICLES:

Mary M. Cheh, *Can Something this Easy, Quick and Profitable Also Be Fair? Runaway Civil Forfeiture Stumbles on the Constitution*, 39 N.Y. Sch. L. Rev. 1 (1994) 26

A. M. Honore, "Ownership" in A.G. Guest, *Oxford Essays in Jurisprudence* (Oxford Univ. Press, Oxford, England 1961) ..... .24

Charles Reich, *The New Property*, 73 Yale L.J. 733 (1964) 15

PETITION FOR A WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this case on December 23, 1999.

OPINIONS BELOW

The Report and Recommendation of the Magistrate Judge finding a medical license is "property" under the federal criminal forfeiture scheme, is unreported and is reproduced in the Appendix at A. 14a.[1] The order of the District Court adopting the Report and Recommendation of the Magistrate Judge and the Final Order and Judgment of Forfeiture by the District Court are also unpublished and are reproduced in the Appendix at A. 20a and A. 26a respectively. The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 198 F.3d 1284 and is reproduced in the Appendix at A. 1a. The order of the Court of Appeals denying Petitioner's petitions for rehearing and rehearing en banc is unreported and is reproduced in the Appendix at A. 38a.

JURISDICTION

The judgment of the District Court was entered on November 26, 1996. The judgment of the Court of Appeals was entered on December 23, 1999. Petitioner's timely petition for rehearing was denied on March 29, 2000. This Court has jurisdiction pursuant to 18 U.S.C. § 1254(1).

---

[1] "A." denotes the appendix to this Petition. "R." designates the trial record, the Roman Numeral indicating the volume number.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The criminal forfeiture provision of the Comprehensive Drug Abuse Prevention and Control Act of 1970, as amended, 21 U.S.C. § 853, is set forth in the Appendix at A. 40a. Section One of the Fourteenth Amendment to the United States Constitution is set forth in the Appendix at A. 41a.

STATEMENT

A. The Criminal Offense.

Dr. Richard Dicter was a practicing physician between 1992 and 1994. During this time Dr. Dicter met Ronnie Gullett who was addicted to certain controlled substances including Percodan and Percocet. R. X, 907-76. The government alleged that Dr. Dicter wrote prescriptions for Ronnie Gullett without a legitimate medical basis and not in the usual course of medical practice. Gullett, in an attempt to obtain more narcotics, begin asking Dr. Dicter to write prescriptions for his employees, his wife, and sister, who testified at trial that they were not patients of Dr. Dicter's and had never been treated by him. F. VIII, 602-615; F. IX, 769-834; R.X, 835-64; R. XI, 1085-1106; R. X, 123-80.

The federal jury convicted Dr. Dicter of one count of conspiracy to unlawfully distribute controlled substances and two-hundred thirty counts of unlawfully distributing controlled substances in violation of 21 U.S.C. § 841(a)(1)

and was sentenced to concurrent terms of 42 months incarceration on all counts. R. III, 86.[2]

B. The Forfeiture Proceedings.

The indictment announced that the government sought forfeiture of "the medical license of Richard M. Dicter, M.D., issued by the Georgia Composite Board of Medical Examiners under 21 U.S.C. § 853 as property that facilitated his drug offenses." R. I., 31-32. Dr. Dicter filed a motion to dismiss the forfeiture count of the indictment asserting that the medical license was "purely a matter between the State Board of Medical Examiners and the defendant and is not a transferable property right." A. 41a.

The District Judge referred the question to Magistrate Judge John R. Struther who ruled the medical license was forfeitable within the meaning of federal criminal forfeiture provisions. He offered that "it could be argued that the provisions of the law relative to forfeiture as applied to Dr. Dicter are unconstitutional because the law is an interference by the federal government with the State of Georgia's exclusive right to license persons to the practice of medicine." *Id.* The Magistrate Judge, however, did not consider this point as "the defendant does not raise a Tenth Amendment challenge." *Id.*

On the defendant's request for reconsideration, the Magistrate Judge ruled that while the defendant had argued that the right to control licensure was an exclusive right of the State of Georgia, he had not argued that the Tenth Amendment limited the federal government's power. A. 14a.

---

[2] The District Court had jurisdiction over this prosecution pursuant to 18 U.S.C. § 3231.

Jack T. Camp, the United States District Judge, presiding over Dr. Dicter's case, adopted the Magistrate's Report and Recommendation denying the Motion to Dismiss the forfeiture provision. A. 19a.

Following its finding of guilt on all counts, the jury was asked to consider the forfeiture of Dr. Dicter's medical license. The Court instructed the jury that "Defendant's license to practice medicine is property within the meaning of applicable law" and asked the jury to consider whether this property facilitated the crime. A. 21a-23a.

The jury, obviously concerned with the task of denying the Petitioner his livelihood, sent a note to the District Judge. It asked four questions:

1) Is probation or some other option possible if Dr. Dicter keeps his medical license?

2) Does the law or Medical Board allow some type of monitoring of a physician's practice?

3) Is it possible to allow him to maintain his medical license without having a DEA registration?

4) Is a suspension of a medical license a possibility?

A. 24a.

The Court responded that it could not answer the jury's concerns and instructed the jury to refer to its written instructions. A. 25a.

The jury returned a verdict forfeiting the license and the District Court entered an order of forfeiture as follows:

> IT IS HEREBY ORDERED, ADJUDGED AND DECREED:
>
> 1. That the right, title and interest to the Medical License of Richard M. Dicter, M.D., issued by the Georgia Composite Board of Medical Examiners, is hereby condemned and forfeited to the United States of America.
>
> 2. That the United States Marshall shall dispose of the property by providing written notice to the Georgia Board of Medical Examiners, the United States Drug Enforcement Administration and to the defendant Richard M. Dicter, M.D.

A. 27a.

C. The Court of Appeals' Ruling.

The Court of Appeals held that the right to practice medicine was property subject to forfeiture under 21 U.S.C. § 853. *United States v. Dicter*, 198 F.3d 1284, 1290 (11th Cir. 1999).

The Court held that section 853 defined property to include "tangible and *intangible* personal property, *including rights*, privileges, interests and claims." *Id.* (Emphasis in original.) The right to practice medicine being a *right*, the Court held it to be covered by section 853. The Court further noted that forfeiture laws look to state law to define property

and, under Georgia law, a licensee is entitled to a hearing prior to a license's revocation – thus it is a property right and therefore subject to forfeiture. *Id.* (citing *Leakey v. Georgia Real Estate Comm.*, 55 S.E.2d 818, 819 (Ga. 1949)).

The Court then held that the Tenth Amendment did not bar the federal forfeiture of this state-issued license as the State Medical Board was not restricted by the forfeiture from issuing the Petitioner another license. *Dicter*, 198 F.3d at 1291-92.

REASONS FOR GRANTING THE WRIT

This case raises an important question about the limits of federal power and the sort of hearing to which a professional is entitled before his license is revoked. The Eleventh Circuit held a medical license to be forfeitable "property" within the meaning of the Comprehensive Drug Abuse Prevention and Control Act of 1970, thus raising questions of whether Congress has the power to revoke a state-issued license and whether the procedure Congress created for revocation satisfies due process.

The Courts of Appeals are in conflict over whether a state-granted license or position may be revoked by the federal government consistent with principles of federalism. The Second and Ninth Circuits hold that a federal court may not, as part of a criminal proceeding, revoke, or order the revocation of a state-issued license. *United States v. Sterber*, 846 F.2d 842 (2d Cir. 1988); *United States v. Snyder*, 852 F.2d 471 (9th Cir. 1988). The Sixth Circuit has held that a federal court may order an elected official to surrender his elected position as a condition of his probation. *United States v. Lewis*, No. 86-5103, 1987 WL 35966 (6th Cir. 1987). The Eleventh Circuit held in the instant case that a

state-issued medical license could be revoked by a federal judge as part of a criminal proceeding upon a showing that the license facilitated a drug crime. *Dicter*, 198 F.3d at 1290-92.

Due process entitles a physician a hearing to demonstrate why he should be permitted to engage in his livelihood notwithstanding a conviction. *Rehman v. California*, 85 S.Ct. 8, 9 (1964). Interpreting the Comprehensive Drug Abuse and Control Act of 1970 to permit the forfeiture of a medical license bypasses a state proceeding giving a physician that opportunity and substitutes a procedure that merely determines whether the license was used in connection with the offense.

The Court is currently considering whether the Mail Fraud Act defines property in a manner so broad that a scheme to defraud a state or municipality of a license amounts to an attempt to fraudulently obtain property. *Cleveland v. United States*, 120 S.Ct. 1416 (2000). While the instant case presents a similar question, *Cleveland* will not resolve whether a license is property once issued.

The controversy in *Cleveland* illustrates that the Courts of Appeals are in conflict over whether a license can be property in the hands of a licensee but something else in the hands of the issuing sovereign. Some Courts of Appeals regard a license as taking on a different legal character when issued. *See United States v. Kato*, 878 F.2d 267 (9th Cir. 1989); *United States v. Murphy*, 836 F.2d 248, 253-54 (6th Cir. 1988). Other Courts insist that whatever legal character a license has, issuing the license cannot change its character -- it is either always property or never property. *See United States v. Salvatore*, 110 F.3d 1131, 1140 (5th Cir. 1997); *United States v. Martinez*, 905 F.2d 709, 714 (3d Cir. 1990). The resolution of the sole question in *Cleveland* of whether an unissued license is property within the meaning of the

Mail Fraud Statute will leave a divide among the Circuits on whether a license is forfeitable property once issued.

Federalism concerns are more acutely implicated by defining a license as property in the forfeiture context than in the Mail Fraud Statute. Forfeiture of medical licenses displaces a board of physicians who have expertise in regulating the medical profession and a host of alternative sanctions with a federal jury given the possibility of only a single sanction, forfeiture -- absolute revocation of the license. This Court has a "well-established presumption against federal pre-emption of state law." *Jones v. United States,* 120 S.Ct. 1904, 1912 (2000) (Stevens, J., concurring). The use of federal forfeiture -- a criminal proceeding -- to revoke a state medical license is part of a growing trend by federal prosecutors to use federal criminal law to "effectively displace a policy choice made by the States." *Id. See also United States v. Lopez*, 514 U.S. 549 (1995) (federal crime prohibiting weapons in school zone exceeded Congress' authority under the Commerce Clause). Displacing regulation by a professional's peers with a federal forfeiture proceeding is part of this questionable trend deserving this Court's scrutiny.

I. THE ELEVENTH CIRCUIT'S EXPANSIVE INTERPRETATION OF THE REACH OF FEDERAL CRIMINAL FORFEITURE RAISES SUBSTANTIAL CONSTITUTIONAL CONCERNS.

This case raises two serious constitutional issues. First, a circuit split exists on the issue of whether the federal government may revoke, or order the revocation of a state-issued license. Second, the Second Circuit and one member of this Court have indicated that procedural due process guarantees a physician the right to a hearing on whether,

notwithstanding his criminal conviction, he should be permitted to continue practicing medicine. Forfeiture asks only whether the property -- here a medical license under the government's theory -- facilitated the commission of the offense. Neither constitutional question is faced if federal courts use a natural and narrow construction of the word "property" in the criminal forfeiture statutes. The Eleventh Circuit's expansive interpretation of the word "property," however, requires these issues to be considered.

A. The Courts of Appeals are Divided on Whether a Federal Court May Revoke Or Order the Revocation of a State-Issued License.

The federal government is absolutely barred from denying a citizen his state-issued license in the Second and Ninth Circuits. *See United States v. Snyder*, 852 F.2d 471, 475 (9th Cir. 1988); *United States v. Best*, 573 F.2d 1095 (9th Cir. 1978); *United States v. Sterber*, 846 F.2d 842 (2d Cir. 1988); *United States v. Pastore*, 537 F.2d 675 (2d Cir. 1976).

District courts in the Fourth and Seventh Circuits recognize that while a federal court may limit a criminal defendant's activity during a period of probation, the federal government has no power to revoke a state-issued license. *United States v. Knotts*, 722 F. Supp. 1365 (E.D. Va. 1989), motion for reconsideration denied, 726 F.Supp. 1042 (E.D. Va. 1989); *United States v. Stenzel*, No. 90 CR 551, 1993 WL 276116 (N.D. Ill. 1993).[3]

[3] The Eleventh Circuit held that federal criminal forfeiture of the defendant's medical license did not violate the Tenth Amendment because the forfeiture of this license did not preclude the State of Georgia from issuing Dr. Dicter another license. *Dicter*, 198 F.3d at 1291-92. Nothing would have prohibited the respective States from reissuing licenses in the Second and Ninth Circuit cases. *See Sterber*, 846 F.2d at 844; *Pastore*, 537 F.2d at 682; *Snyder*, 852 F.2d at 475; *Best*, 573 F.2d at 1102. The Eleventh Circuit is the only Circuit to find this reasoning persuasive.

In the Eleventh Circuit, however, a federal prosecutor need only demonstrate that one of certain federal crimes were committed in connection with a professional practice and the national government becomes a regulator of the practice of professionals. *Dicter*, 198 F.3d at 1290-92. Only the Sixth Circuit has come close to permitting such encroachment into state powers in federal criminal cases. The Sixth Circuit has recognized that a condition of probation may prohibit a defendant from engaging in an activity which would, as a matter of fact, require the surrender of a state position to which a defendant was elected.

In *United States v. Lewis*, No. 86-5103, 1987 WL 35966 (6th Cir. 1987), the Sixth Circuit permitted a federal district court to order as a term of probation that the defendant not hold public office. Surely, federal courts have broad authority to order a defendant to refrain from certain conduct -- even if the activity is permitted by a state issued license -- however, the majority of the Courts of Appeals forbid requiring the defendant to relinquish a then-held state-issued license to engage in an activity.[4] The defendant in *Lewis* was the sitting Mayor of Tiptonville, Tennessee. *Id.* at *5. There could be but one Mayor of Tiptonville, and there must be one Mayor of Tiptonville. Judge Jones, in dissent, therefore argued that this condition of probation unconstitutionally intruded on the right to engage in an activity granted by a sovereign state. It was for "the state or municipality to determine whether a convicted person should be forced to resign from such an elected position." *Id.* at *8.

---

[4] See *United States v. Cutter*, 58 F.3d 825, 838 (2d Cir. 1995) (Court may order defendant not to engage in a profession during term of probation, but may not revoke state issued license); *United States v. Martinez*, 988 F.Supp. 975, 978 (E.D. Va. 1998) (court may order defendant not to drive during period of probation but may not revoke state-issued driver's license).

The Second Circuit, to the contrary, held federal revocation of the right to engage in a livelihood "implicates important notion of federalism," license. *United States v. Sterber*, 846 F.2d 842, 844 (2d Cir. 1988). The Court held that "before any defendant is required to give up his job, or trade or profession, he should be given a meaningful opportunity to demonstrate why such a condition might be inappropriate." *United States v. Pastore*, 537 F.2d 675, 682 (2d Cir. 1976). The Court held that "[g]iven the alternative of well-defined procedures for expulsion from the bar, which would have accorded appellant procedural rights here denied him," the federal court could not order the surrender of the defendant's law license. *Id.* at 683.

The Second Circuit recognized that "there is a serious issue whether a federal district judge can require a defendant to give up his livelihood." *Id.* In *Pastore*, a federal district judge required the defendant to surrender his law license as a condition of probation. As if envisioning the instant case with disbelief, the Second Circuit asked rhetorically:

> Could a district judge require a doctor to relinquish his license to practice medicine? Could a judge force a teacher to resign from a public school or from a private school or to give up private tutoring? What about a bricklayer? Could he be required to resign as an officer of his union? These are perhaps unlikely examples because the connection between the crime and any "treatment of the accused" or "protection of the public" is weak. But suppose the doctor has been convicted of selling narcotics or the teacher of assaulting a child?

Id. at 682.

The Ninth Circuit similarly held that a license created by the state may not be revoked by the federal government. In *United States v. Best*, 573 F.2d 1095 (9th Cir. 1978), the Ninth Circuit held that the Tenth Amendment did not permit "a federal court to require a California agency to carry out [a] federal order to suspend a state-created privilege to drive on California's highways."[5] *Id.* at 1102.

> Drivers' licenses are issued pursuant to the state's police power and the federal government has no constitutional authority to interfere with a state's exercise of its police power except to the extent the state's action intrudes on any of the spheres in which the federal government itself enjoys the power to regulate. Since no legitimate interest is implicated by state-granted license to drive in areas not subject top the federal government's police power, federal courts are constitutionally barred from ordering suspension of driver's licenses.

United States v. Snyder, 852 F.2d 471, 475 (9th Cir. 1988).

---

[5] The Ninth Circuit relied in part for its decision on *National League of Cities v. Usery*, 426 U.S. 833, 842-45 (1976) which "place[d] the integral government functions of states and localities beyond the scope of federal authority." *Best*, 573 F.2d at 1102. *Usery* was overruled by *Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 528 (1985), which held that no particular litmus of "traditional state activity" or "indisputable attribute of state sovereignty" determined the constitutional line past which the federal government may not tread. *Id.* at 536. In *United States v. Snyder*, 852 F.2d 471 (9th Cir. 1988), the Ninth Circuit reaffirmed that the federal government could not revoke a state-granted license. The Ninth Circuit held that *Garcia* "provide[d] no support for the proposition that the federal government may override or interfere with state regulatory schemes in areas not constitutionally susceptible to federal regulation." *Id.* at 475 n.3.

The Ninth Circuit noted that the federal district court that convicted the defendant could have forwarded to the DMV notice of drunk driving convictions in that court pursuant to Cal. Veh. Code § 13363, which authorized the DMV to suspend a motorist's license upon notice of such conviction in any state, territory or possession of the United States. *Best*, 573 F.2d at 1102. "But where not required for the protection of the federal interest, it may neither suspend a state driver's license nor order the state to do so, any more than it could dissolve a state-chartered corporation in federal *quo warranto* proceedings or sentence criminals to terms in the state prison." *Id.*

The disagreement in the Circuits about the federal government's power to interfere with a state-granted license raises profound questions about the power of the federal government to interfere with "fundamental aspects of state sovereignty." *Alden v. Maine*, 527 U.S. 706, 713 (1999). The license at issue in the instant case, a medical license, particularly implicates federalism concerns. The regulation of professionals within a state has been recognized as an aspect of state sovereignty,[6] and this Court has recognized that "direct control of medical practice in the state is beyond the power of the federal government." *Linder v. United States*, 268 U.S. 5, 18 (1925).

---

[6] *See Bates v. State Bar of Arizona*, 433 U.S. 350, 362 (1972); *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424, 428 (1963); *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608, 610 (1935).

B. A Physician's Procedural Due Process Rights May Well Be Violated by Federal Forfeiture of His Medical License.

Interpreting the Comprehensive Drug Abuse Prevention and Control Act of 1970 to permit the forfeiture of a medical license raises a serious question about the constitutional adequacy of forfeiture proceedings to revoke a professional and other state-issued licenses.

The revocation of a medical license implicates issues broader than the question of whether the defendant engaged in criminal conduct triggering forfeiture. As the Second Circuit has recognized, "before any defendant is required to give up his job, or trade, or profession, he should be given a meaningful opportunity to demonstrate why such a condition might be inappropriate." *United States v. Pastore*, 537 F.2d 675, 682 (2d Cir. 1976). A forfeiture proceeding asks only whether property was used to violate a crime that triggers forfeiture. *See* 21 U.S.C. § 853(a).

"[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). The forfeiture scheme provides no basis for permitting a lawyer to argue that the "protection of the public" does not require forfeiture of his license, *see Pastore*, 537 F.2d at 683, or a doctor to argue that it is not "unsafe and improvident to entrust" a medical license to him. *See Rehman*, 85 S.Ct. at 9.

Denying an application for bail, Justice Douglas offered this Court's first statement on the type of procedures constitutionally required to revoke a professional license.

Rehman v. California, 85 S.Ct. 8 (1964). A Court deciding only aspects of a criminal case may not order the surrender of a medical license. *Id.* at 9.

> A doctor might well go to prison for a misdeed in connection with his practice and yet not automatically lose his right to practice medicine. Deprivation of a professional license should require a hearing, *since broader issues than those involved in a criminal case are involved*, e.g., whether the misdeed is of a character to make it unsafe and improvident for the *State* to entrust a medical license to that person. Since that issue could not have been tried either in the criminal case or in the hearing on application for bail, it seemed to me dubious that the requirements of due process had been met.

Id. at 9 (citing Charles Reich, *The New Property*, 73 Yale L. J. 733, 741 (1964) (emphasis added).

This right to a hearing outside the criminal setting is the essence of the right described by Justice Douglas. The Georgia Board of Medical Examiners provides a mechanism to protect just such rights. The Board permits a physician an opportunity to be heard on whether he should be permitted to retain his medical license, irrespective of his violation. Ga. Code Ann. 43-34-38. Surely a physician's commission of a federal crime is a factor the Board may constitutionally consider,[7] but the physician has a due process right to be

---

[7] *See United States v. Best*, 573 F.2d 1095 (9th Cir. 1978) (federal court may report federal traffic offense to state department of motor vehicles that may elect to revoke license); *Barsky v. Board of Regents*, 347 U.S. 442, 462-63 (1954) (medical board, after hearing on physician's right to

heard on the question of whether his commission of a federal crime should prohibit him from engaging in his livelihood in a given state.

The Board of Medical Examiners is comprised of members of the medical profession,[8] who have a unique understanding of the necessary sanctions required to protect the public and the sanctions sufficient to rehabilitate a physician. In Georgia, the Board may impose a variety of sanctions including private or public reprimand, a period of probation, a restriction on the physician's practice, or complete revocation. Ga. Code Ann. § 43-34-37(b)(1).

Federal juries are not required to have competence in medicine or experience in regulating the professional conduct of physicians. Lacking this background, the federal jury is left to contemplate a single sanction -- forfeiture, absolute revocation of the doctor's license -- a verdict required upon a showing the physician committed an enumerated offense in connection with his practice. In the instant case, the jury even asked if it could impose a sentence less than absolute revocation, or if the matter could be referred to the State Board of Medical Examiners. A. 24a.

Principles of federalism suggest a state procedure for the revocation of a professional license should not be displaced with a federal procedure that provides the licensee with a severely more limited opportunity to be heard.

---

continue practicing medicine, may constitutionally suspend license based solely on federal conviction).

[8] In Georgia, the Board is comprised of twelve physicians and one member not affiliated with the practice of medicine. Ga. Code Ann. § 43-34-21.

II. CONGRESS DID NOT INTEND CRIMINAL FORFEITURE TO BE A PROCESS FOR REVOKING STATE-ISSUED MEDICAL LICENSES.

"To displace traditional state regulation . . . the federal statutory purpose must be 'clear and manifest.'" *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994). A medical license is subject to forfeiture only if it is "property." *See* 21 U.S.C. § 853(b). The Courts of Appeals are divided on whether Congress has defined a license to be property within the meaning of criminal statutes. The question centers on whether due process protection from arbitrary deprivation cloaks an entitlement with sufficient vestiges of property such that the protection itself labels the entitlement "property."

Criminal statutes require a narrow construction, *see Jones v. United States*, 120 S.Ct. 1904, 1912 (2000), and Congress intended forfeiture to seize assets that could be transferred within criminal enterprises. *See* H.R. Rep. No. 98-1030, at 191 *reprinted in* 1984 U.S.C.C.A.N. 3182, 3374. Therefore forfeiture of a non-transferable entitlement is contrary to Congressional intent.

A. The Courts of Appeals are Divided on Whether Due Process Protection from Arbitrary Deprivation Defines a License as Property in Federal Criminal Statutes.

The provision of federal law in question permits only the forfeiture of "property" and defines property as:

> (1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests and claims

21 U.S.C. § 853(b).

This statutory scheme requires a differentiation between intangible property and intangible non-property.

The Mail Fraud Statute requires a similar differentiation.[9] A scheme to use the mail to defraud intangible property violates the Mail Fraud Statute while a scheme to defraud intangible non-property rights does not. *Carpenter v. United States*, 484 U.S. 19, 25-26 (1987); *McNally v. United States*, 483 U.S. 350, 359-60 (1987).

The current Circuit conflict over the definition of property in the Mail Fraud Statute is therefore instructive in

---

[9] Forfeiture laws typically look to state law to define property interests. *See United States v. Lester*, 85 F.3d 1409 (9th Cir. 1996), *citing United States v. Yazell*, 382 U.S. 341, 352-53 (1965). However, the question of whether licenses are included in Congress' *definition* of property in the forfeiture context seems a question of federal law.

As a license is property only in the sense that it is protected from arbitrary deprivation, and this right is guaranteed in all states by the Fourteenth Amendment, *see Bell v. Burson*, 402 U.S. 535 (1971), the question of whether a license is property seems appropriate for a uniform definition.

The question of whether Congress intended a uniform definition of the term "property" or permitted it to vary from state to state is presented in this case as it is in *Cleveland* as Courts are undecided on whether to look to state law to define property in the mail fraud context. *See Borre v. United States*, 940 F.2d 215, 226 (7th Cir. 1991) (Easterbrook, J., concurring and dissenting) (arguing that the definition of property in the mail fraud statute should not turn on state law); *United States v. Shotts*, 145 F.3d 1289, 1293-94(11th Cir. 1998) (recognizing most circuits rely on state law to define "property" in mail fraud statute). *But see United States v. Schwartz*, 924 F.2d 410, 417 (2d Cir. 1991) (holding license is not property within meaning of mail fraud statute without referring to state law).

understanding how property will be defined in forfeiture statutes after this Court's decision in *Cleveland*. An analysis of the reasoning of the Courts of Appeals reveals that no consensus exists on what principles define an item as property and whether a license may change its legal character as it passes hands. Some Circuits use due process protection from arbitrary deprivation to label a license property. One Circuit looks to common law principles to determine whether an intangible right, such as a license, is property. Some Circuits hold that a license may not be property in the licensee's hand but something other than property in the government's hand. Other Circuits hold that the legal character of the license can change as it changes hands. *Cleveland* will resolve only a small part of this conflict -- whether an unissued license is property. The nature of the Circuit conflict indicates that *Cleveland* will leave unanswered the important federalism question raised in the instant case, whether a state-issued license, now in the hands of the licensee, is forfeitable property.

1. The Nature of the Circuit Split.

The Third and Fifth Circuits reason that a license is property in the licensee's hand and, as non-property may not become property merely because it changes hands, the unissued license must be property within the meaning of the federal mail fraud statute. *United States v. Salvatore*, 110 F.3d 1131, 1140 (5th Cir. 1997); *United States v. Martinez*, 905 F.2d 709, 714 (3d Cir. 1990). For these Circuits, protection under the due process clause labels a thing "property" for all purposes, including federal criminal statutes, which are to be strictly construed.

The Second Circuit, by contrast, has not looked to due process protection but to common law concepts to determine whether property has been described in a mail

fraud indictment. *United States v. Evans*, 844 F.2d 36 (2d Cir. 1988). In *Evans*, the Court considered the government's theory that falsely reporting to the government destination of arms shipments defrauded the government a property right. *Id.* at 40. The government argued that its regulatory scheme provided "an interest in, and a right to exercise control over, property," namely the weaponry. *Id.* The government argued that its regulatory interest constituted a "non-possessor's interest in the alienation of an object," a property right recognized by the common law. *Id.*

The Second Circuit recognized that "common-law definitions can help elucidate the meaning of 'property'" and that this Court had relied on common law principles to find that confidential business information was property within the mail fraud statute. *Id.* at 40-41 (citing *Carpenter*, 484 U.S. at 26-27). The Court of Appeals noted that the government did not have a property right that resembled a real property right because the nonpossessory holder of a fee simple determinable, fee simple subject to a condition subsequent, possibility of reverter and power of termination all have the possibility of taking possession of the estate. *Id.* at 41.

The Second Circuit then recognized in *United States v. Schwartz*, 924 F.2d 410, 417 (2d Cir. 1991), that *Evans* stood for the principle that a government's regulatory interest does not give the government a property interest even if the right to engage in an activity is formalized in a license. *Id.* at 417. Regulation is control over some thing and, as *Evans* noted, the government may not take possession of that thing, whether it be the weapons sold in *Evans* or the actual practice of medicine in the instant case. See *Evans*, 844 F.2d at 41. The license is therefore not a subject of property within the meaning of the mail fraud statute according to the Second Circuit. *Schwartz*, 924 F.2d at 417. The regulatory license is

simply "a formal embodiment of the government approval." *Id.*

The Sixth and Ninth Circuits, like the Third and Fifth, have looked to protection under the Due Process Clause to determine property rights. These Circuits, however, regard a medical license as having a different legal character in the hands of the licensee than it has unissued in the hands of the licensing sovereign --that a license is property in the hands of the licensee but not in the hands of the government that has yet to issue it. *United States v. Kato*, 878 F.2d 267, 269 (9th Cir. 1989); *United States v. Murphy*, 836 F.2d 248, 253-54 (6th Cir. 1988). The Sixth Circuit's language is somewhat more equivocal than the Ninth's. The Sixth Circuit states "the bingo license *may well* be 'property' once issued, insofar as the charitable organization is concerned, but certainly an unissued certificate of registration is not property of the State of Tennessee." *Murphy*, 836 F.2d at 253-54. (Emphasis added.)

Two Federal Circuits recognize the dubious nature of using due process protection from arbitrary deprivation to label an item property for all purposes. Judge Easterbrook wrote for the Court that a taxi cab license "may be property from the driver's perspective, *in the sense that* he may not be compelled to surrender the entitlement except on proof of wrongdoing." *Toulabi v. United States*, 875 F.2d 122, 125 (7th Cir 1989)(emphasis added). The Seventh Circuit then recognized that the nature of the license from the government's perspective "is a promise not to interfere rather than a sliver of property" and thus was not property within the meaning of the mail fraud statute. *Id.*

The Eighth Circuit similarly recognized a distinction between the nature of property rights of a license in the hands of the government and licensee. Like the Seventh Circuit, the Eighth Circuit recognized the limited application of due

process protection from arbitrary deprivation to define property. "A government permit may in some sense be property in the hands of the person who receives it, but licensing authorities have no property interests in licenses or permits, and allegations that they were obtained by fraud are not sufficient to state an offense under [18 U.S.C.] Section 1341." *United States v. Granberry*, 908 F.2d 278, 280 (8th Cir. 1990).

2. The Issues Unresolved by *Cleveland*

This Court has accepted certiorari to resolve a conflict among the Federal Circuits over whether a license is property within the meaning of the federal mail fraud statute. *Cleveland v. United States*, 120 S.Ct. 1416 (2000). This conflict reveals a deeper conflict worthy of this Court's consideration in the instant case. The conflict reflects fundamental disagreement on the issue of whether reference to "property" in federal criminal statutes includes all interests protected by the Due Process Clause. The question presented in *Cleveland* will answer only whether fraudulently causing the issuance of a license constitutes an unlawful taking of property. This will leave unanswered whether a medical license may be property in the hands of the government but not the licensee or property in the hands of the licensee but not in the hands of the government. In the instant case, this leaves an important question of federalism and due process open to a variety of interpretations.

Should this Court rule a license is property within the meaning of the mail fraud statute, the Second Circuit common law approach to defining property would suggest that a medical license is not subject to forfeiture. In the hands of the issuing sovereign, the license possesses a traditional characteristic of property that it loses once issued: alienability. The physician may not sell, rent, bequeath, or

grant an easement upon his license. The Eighth Circuit has laid the groundwork for just such a dichotomy. "When we say we own something, one of the things that we mean is that we can determine what to do with it. We can either keep it or transfer it to someone else." *Granberry*, 908 F.2d at 208. Those Circuits finding a medical license takes on a different legal character when issued, however, simply would not be aided in defining property under the forfeiture statutes by this Court's decision in *Cleveland*.

Should this Court rule a license is not property within the meaning of the mail fraud statute, the approach of the Sixth and Ninth Circuit would subject a medical license to forfeiture as the legal nature of a license changes when it passes from issuing sovereign to licensee. These Circuits would continue to look to due process protection as the litmus defining property. The Third and Fifth Circuits, however, finding that the character of a license does not change as it passes into the hands of its ultimate holder, would be left to conclude that a medical license is not property and thus not subject to forfeiture. And, recognizing that due process protection may not define entitlements as property for all purposes, the Seventh and Eighth Circuits would be left with little guidance.

The conflict that led this Court to grant certiorari in *Cleveland v. United States*, 120 S.Ct. 1416 (2000), is a fundamental one -- does due process protection from arbitrary deprivation provide an entitlement with sufficient vestiges of property that Congress can be assumed to include licenses in a criminal statute where it mentions property. Important questions of federal power and individual rights will be left unanswered by deciding only whether a license is property within the meaning of the mail fraud statute.

3. A Strictly Construed Interpretation of Property.

This Court has long recognized that the traditional meaning of terms may not be expanded in a criminal statute. *See McBoyle v. United States*, 283 U.S. 25 (1931). In *McBoyle*, Justice Holmes offered that

> [w]hen a rule of conduct is laid down in words that evoke in the common mind the picture of vehicles moving on land, the statute should not be extended to aircraft, simply because it may seem to us that a similar policy applies, or upon speculation that, if the legislature had thought of it, very likely broader words would have been used.

Id. at 27.

The traditional meaning of property was offered by A. M. Honore:

> No doubt the concentration in the same person of the right of using as one wishes, the right to exclude others, the power of alienating and an immunity from expropriation is a cardinal feature of the institution."

A. M. Honore, "Ownership," in A.G. Guest, ed., *Oxford Essays in Jurisprudence,* 113 (Oxford Univ. Press, Oxford, 1961).

The Second Circuit's reference to common law property notions to define property in criminal statutes would appropriately cabin federal criminal law and prevent the

scope of federal forfeiture from reaching state professional licenses. Indeed the Eighth Circuit's common-sense analysis that ownership of property means "[w]e can keep it or give it to someone else," *Granberry*, 908 F.2d at 208, seems an appropriate to define property in a statute that must be narrowly construed.

This construction of the word "property," as illustrated above, certainly is not the only one adopted by federal courts interpreting federal criminal statutes. The various means of interpreting this term in a criminal statute -- many of which bear no resemblance to traditional notions of property -- call for this Court's review.

B. The Forfeiture Power was Designed to Seize Transferable Sources of Wealth and Power.

The purposes of the forfeiture remedy are not served by forfeiting a medical license. The Congressional intent behind modern forfeiture is to undermine the profitability of modern criminal acts and enterprises by seizing the profits and means of committing these crimes. Forfeiture was designed "to be the ideal weapon for breaking the backs of sophisticated narcotics operations." H.R. Rep. No. 98-1030 at 191, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3374

Removing criminals from the street did not remove the economic profitability of criminal organization that could sustain themselves even in the absence of their convicted members.

> Congress found the traditional criminal sanctions of imprisonment and fine wanting in the effort against organized crime. Incarcerating individuals could remove them from the operation of victimized

> organizations. So long as those individuals *retained* or *could transfer economic leverage* over the organizations, however, removing them to prison often resulted only in the rule by proxy or in the promotion of junior members of organized crime.

United States v. Rubin, 559 F.2d 975, 991 (5th Cir. 1977), *vacated on other grounds*, 439 U.S. 810 (1978)(emphasis added).

Sophisticated criminals have hidden assets thus placing the proceeds of crime beyond the government's power to discover and fine. *See Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 641 (1989) (Blackmun, J., dissenting). Organized criminals have employed others as their mules or street-level dealers, leaving the kingpins free from economic sanction when their henchmen are prosecuted. Forfeiture of proceeds and facilitating property prevents the proceeds of street-level criminals from filtering up to the organizers of criminal organizations and removes the property provided street-level dealers to ply their trade, regardless of the property's legal owner.[10] Forfeiture laws are thus designed to prevent tainted or facilitating property from being hidden from law enforcement or used to continue criminal enterprises.

A medical license simply may not be hidden from the government or taken over by another member of a criminal

---

[10] *See generally* Mary M. Cheh, *Can Something this Easy, Quick, and Profitable Also Be Fair? Runaway Civil Forfeiture Stumbles on the Constitution*, 39 N.Y. Sch. L. Rev. 1, 5 n. 28 (1994) (citing Executive Office for Asset Forfeiture, U.S. Dep't of Justice, Annual Report of the Department of Justice Asset Forfeiture Program: Fiscal Year 1992, at 3 (1993) (noting that the objective of forfeiture is to dismantle drug trafficking rings and other criminal enterprises by stripping away their assets including cars, boats or planes used to transport drugs)).

organization. The State Board of Medical Examiners reviews the fitness of each physician every two years and has the power to sanction misconduct at any point in the interim. Ga. Code Ann. § 43-34-24.1(d). Unlike proceeds or a crime that may be hidden or property owned by kingpins but used by mules, a medical license must always be exercised by its holder and may not be squirreled away in a foreign account or transferred to the ownership of another.

The medical license is simply under the constant control of the State Board of Medical Examiners. The forfeiture scheme is unnecessary to prevent the use of a medical license to facilitate a crime or to ensure the government's ability to remove it from a doctor who uses it to commit a crime. A doctor jeopardizes his license whenever he uses it to commit a crime and may not hide it from authorities who are bound by state law to review his conduct.

The Comprehensive Crime Control Act of 1984 amended the Comprehensive Drug Abuse Prevention and Control Act of 1970 and expanded criminal forfeiture to include the provisions codified at 21 U.S.C. § 853. The General Statement and Summary of the 1984 Act describes that forfeited property generally must be sold. "Once an asset is civilly *or criminally* forfeited, the government normally must sell it." H.R. Rep. No. 98-1030, at 194 *reprinted in* 1984 U.S.C.C.A.N. 3182, 3377 (emphasis added). The potential exception, left open by the word "normally" is explained in the footnote referenced at the end of the sentence. "Forfeited property may also be retained for official uses." *Id.* at 3377 n.16. A medical license may neither be auctioned off nor given to a treasury officer who thereby obtains a field promotion permitting him to practice medicine. Items which are exchangeable for value -- or, at a minimum, can be used in the hands of someone other than a uniquely identified individual -- were alone contemplated by

the drafters who limited criminal forfeiture to real or personal property.

CONCLUSION

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

WESLEY MACNEIL OLIVER*
6329 Freret Street
New Orleans, LA 70118
(504) 862-8810

* *Counsel of Record*

June 27, 2000

UNITED STATES of America
Plaintiff-Appellee,
v.

Richard M. DICTER, M.D.
Defendant-Appellant.

No. 96-9448

United States Court of Appeals
Eleventh Circuit

Dec. 23, 1999

Jake Waldrop, Fed. Pub. Defender, Atlanta, GA, for Dicter.

Sandra Elizabeth Strippoli, Asst. U.S. Atty., Atlanta, GA, for United States.

Wesley MacNeil Oliver, Edwards, Simmons & Oliver, Nashville, TN, for Amicus: National Ass'n of Criminal Defense Lawyers.

Appeal from the Unites States District Court for the Northern District of Georgia.

Before EDMONSON and BIRCH, Circuit Judges, and OWENS*, Senior District Judge.

EDMONSON, Circuit Judge:

---

* Honorable Wilbur D. Owens, Jr., Senior U.S. District Judge for the Middle District of Georgia, sitting by designation.

Defendant, Richard M. Dicter, M.D., appeals his convictions and sentence of conspiring to distribute unlawfully controlled substances and unlawfully distributing controlled substances, in violation of 21 U.S.C. § 841. Defendant also appeals the forfeiture of his state medical license under 21 U.S.C. § 853. We affirm.

BACKGROUND

Defendant, an Atlanta physician, began selling prescriptions to Ronnie Gullett ("Gullett") in February 1992. At that time, Defendant visited Gullett's car wash, where Gullett told Defendant that he suffered from chronic back pain. Gullett also told Defendant that he previously had taken Percodan for the pain. Defendant offered to "help" Gullett with his pain: Gullett paid Defendant $100, and Defendant wrote a Percodan prescription for Gullett.

Thereafter, Defendant regularly prescribed various controlled substances for Gullett. Defendant prescribed Percodan, Percocet, Fiorinal, Vicodin ES, and Darvocet-N 100 for Gullett.[1] Defendant issued prescriptions for Gullett on 230 occasions. Some of these prescriptions were written in Gullett's name; others purported to prescribe controlled substances for Gullett's friends and relatives. Regardless of the names on the prescriptions, however, the controlled substances went to Gullett. On several occasions, Defendant phoned-in prescriptions to a pharmacist, later following up with a written prescription. Gullett generally paid between $100 and $500 for each prescription; on multiple occasions, Gullett paid $500 for a prescription.

---

[1] Percodan and Percocet are schedule II controlled substances. Fiorinal and Vicodin ES are schedule III controlled substances. Darvocet-N 100 is a schedule IV controlled substances.

Defendant eventually attracted the attention of investigators from the Georgia Secretary of State's Office. In 1993 and early 1994, the investigators subpoenaed from Defendant the medical records of ten persons, friends and relatives of Gullett and Gullett himself, to whom Defendant purportedly had written prescriptions. Defendant enlisted Gullett's assistance in obtaining information about the ten "patients" to create medical charts for those persons in response to the subpoenas. Defendant eventually responded to the subpoenas by submitting fabricated and fraudulent medical records to investigators.[2]

Defendant was indicted for one count of conspiring to distribute unlawfully controlled substances and two hundred-thirty counts of unlawfully distributing controlled substances, in violation of 21 U.S.C. § 841(a)(1). At trial, an expert Government witness testified that Defendant's prescriptions for Gullett were not written in the course of legitimate medical treatment. A jury convicted Defendant on all counts. The jury then found that Defendant's state medical license was forfeited to the Government under 21 U.S.C. § 853(a)(2). The district court accordingly ordered Defendant's medical license forfeited and imposed sentence upon Defendant: 42 months' imprisonment; a $1500 fine; and an $11,550 special assessment.[3] Defendant appeals his

---

[2] Many of Defendant's alleged "patients" testified at trial that they had never been examined by Defendant and that they had never received prescriptions from Defendant.

[3] A later order of the district court, clarifying the sentence, provides that the balance of financial penalties, unpaid upon Defendant's release from prison, are to be paid at a rate of $100 per month. The order also provides that "[t]o whatever extent possible, [D]efendant shall begin paying restitution while incarcerated." Because the district court never order Defendant to pay restitution, but only order Defendant to pay a fine and special assessment, we construe the order to render Defendant's financial penalties due immediately, with payment (to the extent

convictions, his sentence, and the forfeiture of his medical license.

DISCUSSION

Defendant contends, first, that his conviction must be reversed because the district court violated Defendant's confrontation rights by improperly limiting his cross-examination of the Government's witnesses.[4] Defendant

---

possible), required while Defendant is incarcerated and with payment of the balance at a rate of $100 per month after Defendant's release.

[4] In particular, Defendant claims that the district court erroneously did not permit him to (1) impeach Ronnie Gullett with statements made by a state court judge at a probation hearing; (2) impeach Gullett with Gullett's prior statement that he falsely would deny having undergone drug rehabilitation at an Atlanta clinic; (3) introduce evidence that Defendant's purported "patients" had also received various prescriptions from other physicians; (4) cross-examine the Government's expert about the propriety of prescribing Percodan for one of Defendant's purported "patients"; (5) cross-examine Gullett's wife about her use of a false identity during Gullett's drug treatment; and (6) cross-examine Gullett's wife about the Gulletts' banking statement.

Defendant's last three claimed errors are belied by the record; the district court, in fact, permitted the cross-examination that Defendant claims was denied. The district court's refusal to allow Defendant to introduce statements—made by a state court judge, about Gullett's propensity for truthfulness - was not error. *See Trustees of the Univ. of Penn. v. Lexington Insur. Co.*, 815 F.2d 890, 904-05 (3d Cir. 1987). Nor was the district court's exclusion of Gullett's prior statement that he *would* deny having received drug treatment. *See* Fed.R.Evid. 401. Even if the exclusion of either matter was erroneous under evidentiary rules, it did not violate Defendant's confrontation rights because Defendant had sufficient opportunity to impeach Gullett's testimony. *See United States v. Garcia*, 13 F.3d 1464, 1468 (11th Cir. 1994).

Defendant also sought to introduce pharmacy records indicating that Gullett had received Percodan (and other drugs) from other doctors. Although the district court refused to admit such evidence during the Government's case-in-chief, Defendant was permitted to cross-examine Gullett extensively about receiving prescriptions from other doctors.

contends, second, that his sentence must be vacated because the district court improperly delegated scheduling of his fine and special assessment payment to the Bureau of Prisons.[5] These contends lack merit; we reject them without extended discussion and affirm Defendant's convictions and sentence.

Defendant also challenges the forfeiture of his state medical license. In particular, Defendant asserts that: (1) the district court improperly permitted an eleven-person jury to return the forfeiture verdict; (2) the district court erroneously instructed the jury that the elements of forfeiture must be proven by a preponderance of the evidence; (3) Defendant's medical license is not property subject to forfeiture under 21 U.S.C. § 853(a)(2); (4) the forfeiture of Defendant's medical license required compliance with state administrative procedures governing the revocation of a license by the Georgia medical licensing board; (5) the district court's conduct of forfeiture proceedings, while the state licensing board was investigating the revocation of Defendant's medical license, violated the *Younger* abstention doctrine; (6) the forfeiture of Defendant's medical license violates the Tenth Amendment; and (7) the forfeiture of Defendant's medical license violates the Eighth Amendment. We reject Defendant's contentions and, accordingly, affirm the district court's order of forfeiture.

Therefore, the district court's refusal to allow introduction of the pharmacy records was not error. *See id.*

[5] The setting of Defendant's fine and the setting of a payment schedule were not improperly "delegated" to prison officials. We believe the district court's original sentence and clarifying order made clear Defendant's fine, special assessment, and payment obligations. *See supra* note 3 and accompanying text. Therefore, the district court delegated no sentencing authority to prison officials. *See McGhee v. Clark*, 166 F.3d 884, 886 (7th Cir. 1999); *Montano-Figueroa v. Crabtree*, 162 F.3d 548, 550 (9th Cir. 1998).

1. ELEVEN-PERSON JURY

Defendant notes that the district court dismissed one of the twelve jurors, so that the juror could attend a job-training session, during forfeiture deliberations. Defendant contends that the district court's decision to proceed with a forfeiture jury of eleven jurors was without "just cause" and violated Fed.R.Crim.P. 23(b). Defendant, however, raised this issue for the first time in his reply brief. Defendant, therefore, has waived this claim.[6] *McGinnis v. Ingram Equip. Co. Inc.*, 918 F.2d 1491, 1496 (11th Cir. 1990).

2. BURDEN OF PROOF IN FORFEITURE PROCEEDINGS

Defendant contends that the district court erred by instructing the jury that the Government need only prove the elements of criminal forfeiture under 21 U.S.C. § 853(a)(2) by a preponderance of evidence. Defendant asserts that the Government, instead, must prove the elements of the forfeiture beyond a reasonable doubt. We disagree; we conclude that the preponderance standard defines the Government's burden of proof in section 853(a)(2) forfeitures.

First, the preponderance standard is most consistent with the notion that section 853(a)(2) forfeiture is a matter of sentencing. The Supreme Court has said that "[f]orfeiture is

---

[6] Defendant says that his failure to raise this issue in his initial brief should be excused because the meaning of "just cause" under Rule 23(b) was unclear before our decision in *United States v. Spence*, 163 F.3d 1280 (11th Cir. 1998), issued after Defendant filed his initial brief. We note, however, that the *Spence* panel merely applied the construction of Rule 23(b) set forth in *United States v. Wilson*, 894 F.2d 1245 (11th Cir. 1990). Because *Wilson* was available to Defendant when he filed his initial brief, we decline to excuse Defendant's waiver of this issue. *See McGinnis*, 918 F.2d at 1496.

an element of sentence imposed following conviction." *Libretti v. United States*, 516 U.S. 29, 116 S.Ct. 356, 363, 133 L.Ed.2d 271 (1995). The language of section 853(a) itself makes clear that its forfeiture provisions are elements of sentencing. *See* 21 U.S.C. § 853(a) (providing that court shall order forfeiture "in addition to any other sentence imposed"). Operating to deprive a convicted defendant of "any of [his] property used, or intended to be used, in any manner or part, to commit, or to facilitate" the defendant's crime, section 853(a)(2) is purely for sentencing: "The forfeiture is not intended to rectify the unjust enrichment of the individual, but to punish the defendant...." *United States v. DeFries*, 129 F.3d 1293, 1315 (D.C. Cir. 1997). The preponderance standard ordinarily governs sentencing matters. *United States v. Barakat*, 130 F.3d 1448, 1452 (11th Cir. 1997).

In addition, in *United States v. Elgersma*, 971 F.2d 690, 697 (11th Cir. 1992) (en banc), we decided that the preponderance standard applies in section 853(a)(1) forfeitures.[7] The statutory language reveals no congressional intent to require a higher standard of proof for section 853(a)(2) forfeitures than for section 853(a)(1) forfeitures. *See United States v. Bieri*, 21 F.3d 819, 822 (8th Cir. 1994). Furthermore, we see "no principles distinction between the two types of forfeitable property that would justify a higher burden of proof to forfeit property used to facilitate a drug crime than is required to forfeit property acquired with drug proceeds." *See id.*

---

[7] We expressly declined, in *Elgersma*, to "reach the question of which standard applies to forfeiture under sections 853(a)(2) and (3)." 971 F.2d at 697 n. 20.

We, therefore, conclude that the preponderance standard governs forfeitures under § 853(a)(2).[8]

3. FORFEITABILITY OF DEFENDANT'S MEDICAL LICENSE UNDER § 853(a)(2)

Defendant claims that his state medical license is not forfeitable under 21 U.S.C. § 853(a)(2). In this regard, Defendant asserts that his license is not "property" within the meaning of section 853.[9] We cannot agree.

---

[8] We follow the First, Fourth, Sixth, and Eighth Circuits. *See United States v. Rogers*, 102 F.3d 641, 648 (1st Cir. 1996); *United States v. Tanner*, 61 F.3d 231, 235 (4th Cir. 1995); *United States v. Smith*, 966 F.2d 1045, 1052 (6th Cir. 1992);*United States v. Bieri*, 21 F.3d 819, 822 (8th Cir. 1994). Our conclusion, that the preponderance standard applies under § 853(a)(2), is also consistent with the Third and Seventh Circuits, which have said that the preponderance standard applies generally to section 853(a) forfeitures. *See United States v. Sandini*, 816 F.2d 869, 875-76 (3d Cir. 1987); *United States v. Herrero*, 893 F.2d 1512, 1542 (7th Cir. 1990).

[9] In a related contention, Defendant also asserts that his state medical license did not "facilitate [his] commission of unlawfully distributing controlled substances." First Defendant affirmatively waived this argument at trial. Defendant's counsel argued to the jury: "For me to argue at this point in light of what you have found that [Defendant's license] did not facilitate would be insulting, and I don't intend to do that."

And, this contention is simply wrong. Defendant was able to write prescriptions for controlled substances because he held a DEA registration permitting him to do so for legitimate medical reasons. Defendant was able to obtain the DEA registration because he was a licensed medical practitioner in Georgia. Defendant's medical license, therefore, was essential to his ability to provide Gullett with controlled substances. As such, that Defendant's medical license "facilitated" his commission of the charged crimes seems clear. *See United States v. Rivera*, 884 F.2d 544, 546 (11th Cir. 1989) (adopting broad interpretation of "facilitate" under § 853).

Defendant's contention is belief by the plain language of section 853. Property subject to forfeiture under Section 853 includes "tangible and *intangible* personal property, *including rights*, privileges, interests, claims and securities." 21 U.S.C. § 853(b)(2) (emphasis added). A Georgia medical license confers "the right to practice medicine in [the] state" upon the licensee. O.C.G.A. § 43-34-27(A)(1). Defendant's medical license, therefore, constitutes "property" for the purposes of section 853.

Our conclusion that Defendant's medical license constitutes "property" under section 853 is confirmed by Georgia law. *See United States v. Shotts*, 145 F.3d 1289, 1294-95 (11th Cir. 1998) (looking to state law to determine whether state-issued license is "property" under mail fraud statute). Under Georgia law, a state-issued license "to engage in a profession, trade, or occupation" is a property right. *See Leakey v. Georgia Real Estate Comm.*, 80 Ga.App. 272, 55 S.E.2d 818, 819 (1949). The Georgia Supreme Court has noted: "the right to practice medicine is ... a valuable property right." *Yeargin v. Hamilton Memorial Hosp.*, 225 Ga. 661, 171 S.E.2d 136, 139 (1969).

4. GEORGIA PROCEDURES FOR REVOCATION OF A MEDICAL LICENSE

Georgia law mandates certain procedures for the revocation of a medical license by the state medical licensing board. *See* O.C.G.A. § 43-34-38. Defendant contends that the district court was required to abide by these state law procedures in forfeiting Defendant's medical license because the forfeiture, in effect, operates as a revocation of Defendant's license. This contention is without merit. Under 21 U.S.C. § 853, Defendant's medical license is forfeitable to the Government "irrespective of any provision of State law." 21 U.S.C. § 853(a). In the light of the clear language of section 853, the district court was not required to implement

the procedures set out by state law to forfeiture Defendant's medical license. *See generally, American Manuf. Mut. Insur. Co. v. Tison Hog Market, Inc.*, 182 F.3d 1284, 1287 (11th Cir. 1999) (discussing Supremacy Clause).

Nonetheless, we need not rest our decision on preemption grounds because, in this case, no conflict exists between the Georgia administrative scheme and this criminal forfeiture. O.C.G.A. § 43-34-38 is inapplicable to this forfeiture by its own terms. The Georgia statute does not purport to govern proceedings in the courts; it specifically governs only "[p]roceedings *before the board* wherein a licensee's right to practice medicine in this state is terminated, suspended, or limited." O.C.G.A. § 43-34-38 (emphasis added).

5. *YOUNGER* ABSTENTION

Defendant, citing *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), also contends that, because state licensing officials were investigating Defendant's conduct at the time of Defendant's trial, the district court should have abstained from the forfeiture of Defendant's state medical license. The *Younger* doctrine ordinarily requires federal district courts to refrain from enjoining pending state criminal or quasi-criminal proceedings. *Old Republic Union Insur. Co. v. Tillis Trucking Co., Inc.*, 124 F.3d 1258, 1261 (11th Cir. 1997).

Younger, however, is inapplicable to the instant case. This case is not one where a state-court defendant comes to federal court seeking equitable relief against a state-court proceeding; this case is a direct, federal criminal prosecution. *See United States v. Composite State Bd. of Med. Exam'rs*, 656 F.2d 131, 134 (5th Cir. 1981) ("[A]bstention is inappropriate when, as here, the United States is seeking to assert a federal interest against a state interest.").

6. TENTH AMENDMENT

Defendant also argues that the forfeiture of his medical license violates the Tenth Amendment. Defendant says: (1) the State of Georgia has the "power to control medical licensing" of Georgia physicians; (2) the forfeiture of Defendant's medical license prohibits the Georgia medical licensing board from re-licensing Defendant; (3) the forfeiture, therefore, violates the Tenth Amendment by depriving the state of its power to license Defendant. We find Defendant's argument uncompelling.

The State of Georgia has a powerful interest in controlling the licensing of physicians practicing in Georgia. Nonetheless, we do not see how the forfeiture of Defendant's medical license prohibits the state licensing board from regulating Defendant's practice of medicine in Georgia. The district court simply ordered the forfeiture of a definite thing, a *particular* medical license: the medical license held by Defendant and "issued by the Georgia Composite Board of Medical Examiners." The district court's order of forfeiture does not purport to forfeit any other medical license, including one that might be issued to Defendant by the Georgia medical licensing board in the future.

Furthermore, Defendant's license was forfeited on the ground that it was "used ... to facilitate the commission of" Defendant's unlawful distribution of controlled substances from 1992 through 1994. *See* 21 U.S.C. § 853(a)(2). Any license that might be issued in the future (but has not yet been issued, and certainly was not in existence between 1992 and 1994) could not have facilitated the Defendant's unlawful distribution of controlled substances. Therefore, any such future license was not forfeited to the United States. Whether the Georgia medical licensing board is authorized to issue another, *different medical license* to Defendant in the

future is an issue solely of Georgia law.[10] The Georgia board's power is unaffected by this forfeiture. Defendant's Tenth Amendment contention, therefore, lacks merit.

7. EIGHTH AMENDMENT

[15-17] Defendant asserts that the forfeiture of his medical license constitutes an excessive fine in violation of the Eighth Amendment. "[A] punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." *United States v. Bajakajiun*, 524 U.S. 321, 118 S.Ct. 2028, 2036, 141 L.Ed.2d 314 (1998). "[J]udgments about the appropriate punishment for an offense belong in the first instance to the legislature." *Id.* at 2037. Therefore, we look to the maximum fine for Defendant's offenses, as prescribed by Congress and the United States Sentencing Commission (USSC), in determining whether the instant forfeiture is excessive. If the value of the forfeited property is "within the range of fines" authorized by Congress and the USSC, "a strong presumption arises that the forfeiture is constitutional." *United States v.*

---

[10] *See* O.C.G.A. § 43-34-21 (providing for appointment of Composite State Board of Medical Examiners); O.C.G.A. § 43-34-24.1 (d) (providing that "[l]icenses issued by the board which are subject to renewal *shall be valid for up to two years* and shall be renewable biennially on the renewal date established by the board") (emphasis added). See also O.C.G.A. § 43-34-37(c), which provides: "In its discretion, the board may restore and reissue a license to practice medicine issued under this chapter or any antecedent law and, as a condition thereof, may impose any disciplinary or corrective measure provided in this chapter."

The "license to practice medicine issued under this chapter" to Defendant has been forfeited; so, it, strictly speaking, cannot be "restored" or "reissued." We, however, offer no opinion on whether O.C.G.A. § 43-34-37(c), or any other Georgia statutory provision, authorizes the Georgia medical licensing board to issue *another, different* license to Defendant under some circumstances. That is a question of Georgia law, and it is a question that is not now before this court.

817 N.E. 29th Dr., Wilton Manors, Florida, 175 F.3d 1804, 1309-10 (11th Cir. 1999).

Defendant's crimes involved the prescribing of more than 2 million milligrams of Percodan, a schedule II drug (the equivalency of more than 1100 kilograms of marijuana). *See* U.S.S.G. § 2D1.1 (setting out drug equivalent conversion factors). Defendant was convicted of more than 200 counts of unlawfully distributing schedule II drugs. Congress and the USSC have prescribed severe monetary penalties for a defendant convicted of so many violations of 21 U.S.C. § 841(a), involving the unlawful distribution of such quantities of schedule II controlled substances. *See* 21 U.S.C. § 841(b)(1)(C) (providing for $1 million fine for violation of section 841(a) involving schedule II controlled substances); *see also* U.S.S.G. § 5E1.2(c)(4). In the light of the severe penalties for violation of 21 U.S.C. § 841, the large quantities of drugs involved in this case, and Defendant's repeated unlawful conduct, we cannot say that the forfeiture of his medical license is grossly disproportionate to the gravity of his crimes.[11] Defendant's Eighth Amendment argument, therefore, fails.

CONCLUSION

We AFFIRM Defendant's convictions and sentence. We also specifically AFFIRM the forfeiture of Defendant's state medical license.

AFFIRMED.

---

[11] Defendant urges that the forfeited medical license "represents his entire livelihood." We doubt that the forfeiture of Defendant's medical license renders Defendant completely unable to earn a living; most people earn a living without a medical license. More important, we do not take into account the personal impact of a forfeiture on the specific defendant in determining whether the forfeiture violates the Eighth Amendment. *817 N.E. 29th Dr., Wilton Manors, Florida*, 175 F.3d at 1311.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA,	:	
	:	
v.	:	CRIMINAL ACTION
	:	NO. 1:95-CR-275
RICHARD M. DICTER, M.D.	:	

REPORT AND RECOMMENDATION
and
CERTIFICATION AS READY FOR TRIAL

The above case is before the undersigned on pretrial motions. The only motion not passed on at the pretrial conference was a Motion to Dismiss the Forfeiture provisions of the Indictment. This motion brought by Dr. Dicter contends that the government's claim of forfeiture pursuant to 21 U.S.C. 853 is invalid for three reasons:

(1) The medical license is not forfeitable because it is purely a matter between the State of Georgia and the State Board of Medical Examiners and the defendant and is not a transferable property right;

(2) The forfeiture of the medical license is grossly disproportionate to the offense and therefore is cruel and violates the Eighth Amendment to the United States Constitution;

(3) The forfeiture provisions are too vague in that they do not clearly allege the interests in the property that is subject to forfeiture in accordance with Rule 7(c)(2).

The government attempts to forfeit Dr. Dicter's medical license based on 21 U.S.C. § 853(a)(2) which provides as follows:

> (a) Any person convicted of a violation of this subchapter or subchapter II of the chapter punishable by imprisonment for more than one year shall forfeit to the United States, *irrespective of any provision of State law* –
>
> (2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation.

(Emphasis supplied). The defendant is charged with violations which make the forfeiture applicable. 21 U.S.C. § 853(a) provides for mandatory forfeiture, regardless of any provision of state law. The term "property" is described at 21 U.S.C. § 853(b).

> (b) Property subject to criminal forfeiture under this section includes
>
> (1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

It is clear from subsection (b) of § 853 that the definition of "property" includes intangible property such as "rights", "privileges", and "interests." The defendant does not quarrel with the fact that his medical license is a property right under Georgia law. (See defendant's brief at p. 4). Defendant argues that, since the license is controlled by the State Board of Medical Examiners and it cannot be transferred and is exclusively the right of Dr. Dicter, it cannot be forfeited. Since the licensing of doctors is exclusively a function of the State of Georgia, defendant argues that there is nothing to forfeit. Dr. Dicter does not challenge the constitutionality of the Act as it applies in this case but merely argues that the license itself cannot be forfeited.[12]

The wording of the forfeiture statute clearly shows that Congress intended the section to apply to rights that were state matters. The law expressly states that it is "irrespective ... of state law." The Eleventh Circuit has held that federal forfeiture of real estate in drug cases preempts the Florida Homestead Exemption Act. *United States v. Lot 5, Fox Grove*, 23 F.3d 359 (11th Cir. 1994) *cert. denied*, ___ U.S. ___ 115 S.Ct. 722, L.Ed 2d 627 (1995). Further, in a

---

[12] It could be argued that the provisions of the law relative to forfeiture as applied to Dr. Dicter are unconstitutional because the law is an interference by the federal government with the State of Georgia's exclusive right to license persons to practice medicine. Thus the law, as applied to Dicter, could violate the 10th Amendment that guarantees state sovereignty. (*See Lopez v. United States Immigration & Naturalization Service*, 758 F.2d 1390 (10th Cir. 1985); *see also Hodel v. Virginia Surface Mining & Reclamation Assoc.*, 452 U.S. 264 (1981). However, the defendant does not raise a Tenth Amendment challenge.

Seventh Circuit case, it was held that a person awarded fees for management of real estate by a bankruptcy court did not have to comply with Indiana's real estate licensing laws in order to receive the fees. *Park Terrace Townhouses v. Wilds*, 852 F.2d 1019 (7th Cir. 1988). To the extent that the State of Georgia controls medical licenses, it is clear that Congress intended the forfeiture law to preempt state law. Thus, the defendants' arguments that the license can't be forfeited must fail.

As to the Eighth Amendment argument that the penalty of the forfeiture of the medical license would constitute a disproportionate punishment under the United States Constitution, this argument is premature in that there is no factual development of the value of the medical practice nor of the extent of the size of Dr. Dicter's prescription writing to his total medical practice. The defendant may not be convicted and, if this occurs, the request for forfeiture will not be applicable. The issue of the excessiveness of a forfeiture may not be raised until such time as a forfeiture actually occurs. *See United States v.* $633,021.67 *in U.S. Currency*, 842 F. Supp. 528, 535 (N.D. Ga. 1993).

The defendant further argues that the forfeiture provisions of the indictment fail to satisfy Rule 7(c)(2) of the Federal Rules of Criminal Procedure. Defendant contends that the forfeiture provisions' general terms relative to forfeiture of property is not sufficient and that it does not say what assets or property it seeks to forfeit. At the pretrial conference and in its response to the defendant's motion, the government counsel makes it clear that the government seeks to forfeit the defendant's medical license which would include "One hundred per cent of defendants right to practice medicine in the State of Georgia." The government further indicates in its response that this is the only property it is seeking to forfeit from the defendant and therefore it appears that the Rule 7(c)(2) provision has been complied with. It is

therefore respectfully RECOMMENDED that the defendant's Motion to Dismiss the Forfeiture Provisions of the Indictment be DENIED.

Certification as Ready for Trial

All pretrial discovery motions have been ruled on by the undersigned or referred to the trial court. It is therefore ORDERED that, subject to a ruling by the District Judge on any of this magistrate judge's orders or recommendations, the instant action is hereby certified as ready for trial.

AND IT IS SO RECOMMENDED and CERTIFIED this 3 day of October, 1995.

/s/_____
JOHN R. STROTHER, JR.
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA,	)
	) CRIMINAL ACTION
v.	) NO.
	) 1:95-CR-275
RICHARD M. DICTER, M.D.	)

ORDER

The defendant requests reconsideration of the undersigned's Report and Recommendation. He asserts that the undersigned stated that he did not raise the issue of whether the licensing was an exclusive right of the State of Georgia. The undersigned finds that this issue was in fact raised. The undersigned stated in the Report and Recommendation that the defendant did raise an exclusivity argument, but did not specifically raise a Tenth Amendment argument. Thus, the motion for Reconsideration is DENIED, and the motion is to be treated as objections to the Report and Recommendation.

AND IT IS SO ORDERED this 19 day of Oct ,1995.

/s/_____
JOHN R. STROTHER, JR.
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

UNITED STATES OF AMERICA,	)	
	)	CRIMINAL ACTION
v.	)	FILE NO.
	)	1:95-CR-275-JTC
RICHARD M. DICTER, M.D.	)	
	)	
Defendant.	)	

ORDER OF THE COURT

This action has been submitted to the Court on the Magistrate's Report and Recommendations [#17] [#18] and Plaintiff's Objections [#19]. In accordance with 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72, the Court has performed a careful *de novo* review of the record.

Finding the Report correct in all material respects, the Court hereby **ADOPTS** the Magistrate's Report and Recommendation as the opinion of the Court. Therefore, Defendant's Motion to Dismiss the Forfeiture Provisions is **DENIED**. Defendant's Motion for Severance is **GRANTED**.

SO ORDERED this 29 day of Dec ,1995.

/s/ _____
JACK T. CAMP
UNITED STATES DISTRICT JUDGE

O:/L/dicter.r&r

COURT'S INSTRUCTIONS TO JURY
AS TO DEFENDANT
RICHARD M. DICTER,
Filed: Mar. 29, 1996

* * *

[1632] The Court: Okay. Members of the Jury, in view of your verdict of guilty, you have one more task to perform before you are discharged. I now must ask you to render a special verdict concerning property that the United States government has alleged is subject to forfeiture to the United States. All of my previous instructions regarding credibility of witnesses and duty to deliberate apply with respect to this special verdict.

Under federal law, any person who is convicted of the offenses for which the defendant has been found guilty is required to forfeit to the United States the profits, instrumentalities of his or her – and instrumentalities of his or her illegal conduct. Specifically, the laws of the United States provide that the following interests are subject to forfeiture: one, any property constituting or derived from any proceeds the defendant obtained, directly or indirectly, as a ['1633] result of his participation in the offense of which he has been convicted; and, two, any of the defendant's property used or intended to be used in any manner or part to commit or to facilitate the commission of such violation.

Property subject to criminal forfeiture may include real property and tangible or intangible personal property, whether or not the property has been seized by the United States government.

I instruct your that defendant's license to practice medicine in the state of Georgia is property within the

meaning of the applicable law, 21, United States Code, Section 853.

It is your duty to determine what property, if any, should be forfeited. As to each property, you must determine whether the United States government proved that the property was property used or intended to be used in any manner or part to commit or to facilitate the commission of any of the counts of the indictment for which defendant has been found guilty.

The United States does not have to establish that the property is forfeitable beyond a reasonable doubt. The United States government must only establish by a preponderance of the evidence that the property is forfeitable.

To establish something by a preponderance of the evidence means to prove that something is more likely than not, more likely so than not so.

In deciding whether any fact has been proved by a [1634] preponderance of the evidence, you may consider the testimony of all of the witnesses, regardless of who called them, and all of the exhibits received in evidence, regardless of who produced them.

If the proof fails to establish any essential part of the government's case by a preponderance of the evidence, you should find for the defendant as to that item sought to be forfeited.

Property is forfeitable as facilitating property if it makes the underlying criminal activity less difficult or more or less free from obstruction or hindrance.

To be forfeitable, the property need not be used exclusively for illegal activity. Property that is used the vast

majority of the time for legitimate purposes may nevertheless be forfeited if it facilitates a criminal offense. Facilitation of even a single felony offense is sufficient to justify forfeiture.

* * *

JURY NOTE
Filed: March 29, 1996

USA v. Dicter, 1:95-CR-275-JTC
3/29/96

Questions to the Judge:

1) Is probation or some other option possible if Dr. Dicter keeps his medical license?

2) Does the law or Medical Board allow some type of monitoring of a physician's practice?

3) Is it possible to allow him to maintain his medical license without having a DEA registration?

4) Is a suspension of the medical license a possibility?

Rahn C. Hube

USA v. Richard M. Dicter, M.D. March 29, 1996
1:95-CR-275-JTC

Members of the Jury:

The questions you have asked deal with matters which are outside the scope of your instructions upon the law. Please refer to your written instructions.

Dated: March 29, 1996

/s/_____
JACK T. CAMP
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA, :

Plaintiff, : CRIMINAL ACTION
v. No. 1:95-CR-275

RICHARD M. DICTER, M.D. :

Defendant. :

FINAL ORDER AND JUDGMENT OF FORFEITURE

WHEREAS, on April 16, 1996, this Court entered a Preliminary Order of Forfeiture pursuant to the provisions of Title 21, U.S.C. § 853 based upon the trial jury's return of a Special Verdict of Forfeiture against the medical license of Richard M. Dicter issued by the Georgia Composite Board of Medical Examiners;

AND WHEREAS, on May 1, 8 and 15, 1996, the United States published in the *Atlanta Journal-Constitution*, a newspaper of general circulation in this district, notice of this forfeiture and of the intent of the United States to dispose of the property in accordance with the law and further notifying all third parties of their right to petition the Court within thirty (30) days for a hearing to adjudicate the validity of their alleged legal interest in the property;

AND WHEREAS, it appears from the record that no claims, contested or otherwise, have been filed asserting any interest in the medical license of Richard M. Dicter, M.D.;

IT IS HEREBY ORDERED, ADJUDGED and DECREED:

1. That the right, title and interest to the Medical License of Richard M. Dicter, M.D. issued by the Georgia Composite Board of Medical Examiners, is hereby condemned and forfeited to the United States of America.

2. That the United States Marshal shall dispose of the property by providing written notice to the Georgia Board of Medical Examiners, the United States Drug Enforcement Administration and to the defendant Richard M. Dicter, M.D.

The Clerk is hereby directed to send copies of this Order to all counsel of record and the United States Marshal.

SO ORDERED this 26 day of Nov, 1996.

/s/_____
JACK T. CAMP
UNITED STATES DISTRICT JUDGE

Presented by:

KENT B. ALEXANDER
UNITED STATES ATTORNEY

SANDRA E. STRIPPOLI
ASSISTANT U.S. ATTORNHEY
GEORGIA BAR NO. 688565

1800 U.S. COURTHOUSE
75 SPRING STREET, S.W.
ATLANTA, GEORGIA 30335
(404) 581-6304

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF GEORGIA

UNITED STATES OF AMERICA,	:	
	:	CASE NUMBER
v.	:	
	:	NO. 1:95-CR-275-JTC
RICHARD M. DICTER, M.D.,	:	
	:	
Defendant.	:	

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, RICHARD M. DICTER, M.D., was represented by Steven H. Sadow.

The defendant was found guilty on counts 1 through 231 after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such counts, involving the following offenses:

Title & Section	Nature of Offense	Count Number(s)
21 USC § 841 (a)(1) 21 CFR § 1306.04	Conspiracy to Unlawfully Distribute and Dispense a Controlled Substance	1
21 USC § 841 (a)(1) 21 CFR § 1306.04	Unlawful Distribution and Dispensing a Controlled Substance	2-231

As pronounced on November 26, 1996, the defendant is sentenced as provided in pages 2 through 5 of this

Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $11,550.00 for Counts 1 through 231, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 26th day of November, 1996.

/s/ Jack Camp
United States District Judge

Defendant's Soc. Sec. No.: 407-60-0800
Defendant's Date of Birth: 7/16/45
Defendant's address: 1527 Rubes Landing; Marietta, Georgia 30066-1323

Defendant: RICHARD M. DICTER, M.D.
Case Number: 1:95-CR-275-JTC

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 42 months on each of Counts 1 through 231, all such terms to run concurrently.

The Court makes the following recommendations to the Bureau of Prisons: The Court recommends that the Atlanta Prison Camp be designated as the place of confinement.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons within 30 days from the date of sentencing or as later designated by the Bureau of Prisons.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered _____ to _____
at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy United States Marshall

Defendant: RICHARD M. DICTER, M.D.
Case Number: 1:95-CR-275-JTC

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years.

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1 If ordered to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

2. If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remain unpaid at the commencement of the term of supervised release.

3. The defendant shall not own, possess or have under his control any firearm or other dangerous weapon.

4. The defendant shall pay the balance of the financial penalty imposed by this judgment, and that remains unpaid at the commencement of the term of supervised release, at the rate of at least $100 per month.

5. The defendant shall make a full and complete disclosure of his finances and shall submit to an audit of his financial documents, at the request of the probation officer.

6. The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation officer unless he is in compliance with the installment payment schedule.

7. The defendant shall participate in the drug/alcohol treatment program as directed by the probation officer and shall comply with the conditions of the drug/alcohol unit contract. Further, the defendant shall be required to contribute to the costs of services for such treatment not to exceed an amount determined reasonable by the probation officer based on ability pay, on availability of third-party payments and in conformance with the Probation Office's Sliding Scale for Substance Abuse Treatment Services.

8. The defendant shall participate in a program of mental health treatment, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer.

9. The defendant shall submit to a reasonable search of his person, property, residence and/or vehicle at the request of the probation officer.

10. While on supervised release, the defendant shall be denied federal benefits as described by 21 USC § 862(a)(1) for a period up to 5 years.

Defendant: RICHARD M. DICTER, M.D.
Case Number: 1:95-CR-275-JTC

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.

2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other

controlled substance, or any paraphernalia related to such substances.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history of characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Defendant: RICHARD M. DICTER, M.D.
Case Number: 1:95-CR-275-JTC

FINE

The defendant shall pay a fine of $1,500.00. This fine includes any costs of incarceration and supervision.

The Court has determined that the defendant does not have the ability to pay interest. Accordingly, the interest requirement is waived.

This fine shall be paid at the rate of $100.00 per month.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

UNITED STATES OF AMERICA, :

Plaintiff, : CRIMINAL ACTION
versus 1:95-CR-275-JTC

RICHARD M. DICTER, M.D. :

Defendant. :

ORDER

This matter is before the Court on the defendant's motion to clarify sentencing order [DE #91-1] and motion for bond pending appeal [DE #92-1].

I. Motion to Clarify Sentencing Order.

Defendant's motion for clarification of sentence is **GRANTED**. On November 26, 1996, the defendant was sentenced to a 42-month term of imprisonment. The Court imposed a special assessment of $11,550.00 and a fine of $1,500.00. The Court stated at sentencing that, as a condition of supervised release, the defendant shall pay the balance of the financial penalties which remain unpaid at the commencement of the term of supervised release at the rate of at least $100.00 per month. To whatever extent possible, the defendant shall begin paying restitution while incarcerated.

II. Motion for Appeal Bond

After his conviction on March 29, 1996, the Court allowed the defendant to remain on bond pending sentencing. After his sentencing on November 26, 1996, the defendant

was given another 30 days to voluntarily surrender to the designated institution. The court has twice addressed the issue of defendant's post-conviction release. For the reasons stated in the record, the defendant's motion for bond pending appeal is hereby **DENIED**.

SO ORDERED, this 13 day of March, 1997.

/s/_____
JACK T. CAMP
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 96-9448

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RICHARD M. DICTER, M.D.,

Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of Georgia

---

Filed Mar. 29, 2000

ON PETITION (S) FOR REHEARING AND PETITION (S) FOR REHEARING EN BANC

(Opinion_____, 11th Cir., 19__, ___ F.2d____).

Before: EDMONSON and BIRCH, Circuit Judges, and OWENS*, Senior District Judge

PER CURIAM:

The Petition(s)for Rehearing are DENIED and no member of this panel nor other judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petitio (s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ J.L. Edmondson
UNITED STATES CIRCUIT JUDGE

*Hon. Wilbur D. Owens, Jr., Senior U.S. District Judge for the Middle District of Georgia, sitting by designation.

Title 21 United States Code

§ 853. Criminal forfeiture

(a) Property subject to criminal forfeiture

Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law –

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

(2) any of the person property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and

(3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II of this chapter, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this part, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Meaning of term "property"

Property subject to criminal forfeiture under this section includes—

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

* * *

United States Constitution

Amendment 14, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

(2)

No. 99-2092

Supreme Court, U.S.
FILED
JUL 26 2000
CLERK

In The

Supreme Court of the United States

RICHARD M. DICTER, M.D.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF AMICI CURIAE THE AMERICAN MEDICAL ASSOCIATION AND MEDICAL ASSOCIATION OF GEORGIA IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

EMMET J. BONDURANT*
MICHAEL B. TERRY
BONDURANT, MIXSON & ELMORE, LLP
1201 W. Peachtree Street, NW
3900 One Atlantic Center
Atlanta, Georgia 30309
(404) 881-4100

PAUL L. SHANOR, II
DAVID A. COOK
WILLIAM T. CLARK
Medical Association of Georgia
1330 West Peachtree Street
Suite 500
Atlanta, Georgia 30309
(404) 881-5040

MICHAEL L. ILE
ANNE M. MURPHY
LEONARD A. NELSON
CAROLYN QUINN
American Medical Association
515 N. State Street
Chicago, Illinois 60610
(312) 464-5532

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

26pp

TABLE OF CONTENTS

Page

IDENTITY AND INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 4

ARGUMENT 5

I. FEDERAL INTERVENTION IN STATE MEDICAL LICENSING DECISIONS VIOLATES THE TENTH AMENDMENT 5

A. The Regulation of Medical Licensing is a Sovereign Power Traditionally Reserved to the States 6

B. The States, Including Georgia, Have Enacted Regimes for the Grant, Denial, Suspension or Revocation of Medical Licenses by Appointed or Elected Boards of Physicians Applying Factors and Standards Adopted by the State Legislatures 7

C. Forfeiture Upon Conviction of a Crime Without a Hearing Before a Panel of Physicians Is Contrary to the State Regulatory Scheme 8

D. Forfeiture Allows the Prosecutor, Jury and Trial Judge to Substitute Their Judgment for That of the Medical Professionals Designated by the State..... 10

E. The State's Ability to Issue a New License Immediately After Forfeiture Demonstrates That Control Over Licensure Belongs to the State 12

TABLE OF CONTENTS – Continued

Page

F. If the Federal Government Can Constitutionally Impose Revocation of a License, It Could Grant a License or Overrule the Grant of a License 14

G. The Forfeiture of a Medical License Constitutes Unconstitutional Regulation of the Action of the State Medical Board 14

H. In Other Contexts, Federal Courts Have Forbidden Federal Interference with the States' Licensing of Professionals 16

II. A STATE-ISSUED MEDICAL LICENSE IS NOT "PROPERTY" FOR FORFEITURE PURPOSES ... 18

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES:

Barsky v. Board of Regents, 347 U.S. 442 (1954) 6, 7

Bhan v. NME Hospitals, Inc., 669 F. Supp. 998 (E.D. Cal. 1987) 7

Gately v. Sutton, 310 F.2d 107 (10th Cir. 1962) 17

Ginger v. Wayne County Circuit Court, 372 F.2d 621 (6th Cir. 1967) 17

Hughes v. State Board, 134 S.E. 42 (Ga. 1926) 7

In re Cook, 49 F.3d 263 (7th Cir. Ill. 1995) 17

Leakey v. Georgia Real Estate Comm., 55 S.E.2d 818 (Ga. App. 1949) 19

Linder v. United States, 268 U.S. 5 (1925) 6, 11

Lowery v. Lowery, 262 Ga. 20, 413 S.E.2d 731 (Ga. 1992) 19

New York v. United States, 505 U.S. 144 (1992) 14, 15

Pegram v. Herdrich, 120 S.Ct. 2143 (2000) 6

Printz v. United States, 521 U.S. 898 (1997).... 14, 15, 16

Rehman v. California, 85 S.Ct. 8 (1964) 8, 9, 10

Selling v. Radford, 243 U.S. 46 (1917) 16

Sutherland v. Whetstone, 1991 U.S. Dist. LEXIS 6946 (S.D. Ala. Feb. 22, 1991) 17

Szeto v. Louisiana State Bd. of Dentistry, 508 F. Supp. 268 (E.D. La. 1981) 7

United States v. Best, 573 F.2d 1095 (9th Cir. Cal. 1978) 17

TABLE OF AUTHORITIES – Continued

Page

United States v. Dicter, 198 F.3d 1284 (11th Cir. Ga. 1999) 13, 19

United States v. Martinez, 988 F. Supp. 975 (E.D. Va. 1998) 16

United States v. Morrison, 120 S.Ct. 1740 (2000) ... 6, 11, 14

United States v. Pastore, 537 F.2d 675 (2d Cir. 1976) 16

United States v. Polk, 556 F.2d 803 (6th Cir. Tenn. 1977), *cert. denied*, 434 U.S. 862 (1977) 16

United States v. Snyder, 852 F.2d 471 (9th Cir. Cal. 1988) 17

United States v. Stenzel, 1993 WL 276116 (N.D. Ill. 1993) 18

Yeargin v. Hamilton Memorial Hosp., 171 S.E.2d 136 (Ga. 1969) 6, 19

STATUTES:

O.C.G.A. §§ 43-34-1 through 43-34-46 7

O.C.G.A. § 43-34-21(a) 8

O.C.G.A. § 43-34-21(b) 7

O.C.G.A. § 43-34-24.1(d) 13

O.C.G.A. § 43-34-36 15

O.C.G.A. § 43-34-37(a)(3) 8

O.C.G.A. § 43-34-37(b) 10

O.C.G.A. § 43-34-37(b)(1) 9

O.C.G.A. § 43-34-37(b)(2) 9

O.C.G.A. § 43-34-39 15

TABLE OF AUTHORITIES – Continued

Page

REGULATIONS:

AMA Policy H-275.978(8) 3

Rules and Regulations of the State of Georgia, 360-2-.09(d) 8

Rules and Regulations of the State of Georgia, 360-2-.09(e) 8

Rules and Regulations of the State of Georgia, 360-2-.09(g) 8

Rules and Regulations of the State of Georgia, 360-2-.09(k) 8

Rules and Regulations of the State of Georgia, 360-2-.01 through 360-15-.02 (1999) 7

IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amicus the American Medical Association ("AMA"), an Illinois non-profit corporation, is an association of approximately 300,000 physicians who practice medicine throughout the United States. The AMA was founded in 1847 to promote the science and art of medicine and the betterment of public health, and these remain its core purposes. Its members practice in all fields of medical specialization, and it is the largest medical society in the United States.[2]

---

[1] Letters of consent to the filing of this brief have been lodged with the Clerk of Court pursuant to Rule 37.3 of this Court. Pursuant to Rule 37.6, *amici curiae* state that their counsel authored this brief in its entirety. No person or entity other than the *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

[2] The AMA joins this brief as a representative of the Litigation Center of the American Medical Association and the state medical societies. The Litigation Center was formed in 1995 as a coalition of the AMA and private, voluntary, non-profit state medical societies to represent the views of organized medicine in the courts. Forty-nine state medical societies join the AMA as members of the Litigation Center. The member organizations, in addition to the AMA, are: Medical Association of the State of Alabama, Alaska State Medical Association, Arizona Medical Association, Arkansas Medical Society, California Medical Association, Colorado Medical Society, Connecticut State Medical Society, Medical Society of Delaware, Medical Society of the District of Columbia, Florida Medical Association, Medical Association of Georgia, Hawaii Medical Association, Idaho Medical Association, Illinois State Medical Society, Indiana State Medical Association, Iowa Medical Society, Kansas Medical Society, Kentucky Medical Association, Louisiana Medical Society, Maine Medical Association, MedChi, the Maryland State Medical Society, the Massachusetts Medical Society, Michigan State Medical Society, Minnesota Medical Association, Mississippi State Medical Association, Missouri

Amicus the Medical Association of Georgia ("MAG") is a non-profit, voluntary professional association of Georgia physicians. MAG was founded in 1849, is affiliated with the AMA, and is the largest physicians' association in Georgia. Presently, MAG has over 7,500 members – more than 5,000 of whom are physicians actively practicing medicine in the state of Georgia. MAG is an active advocate for Georgia physicians and their patients.

The interest of the AMA and MAG in this issue is to preserve the integrity of the state medical licensing board system through which the states, including Georgia, apply medical expertise and judgment to all physician licensing decisions. The AMA and MAG emphatically repudiate the conduct for which Dr. Dicter was convicted. However, the issue *sub judice* is not Dr. Dicter's conduct, which clearly warrants criminal sanctions. Rather, it is whether the federal government improperly invades the province of the state by forfeiting a state-issued medical license rather than leaving the issue of licensure up to a state-appointed panel of physicians.

> It has long been the policy of the AMA that the evaluation of information collected by licensing boards be undertaken only by persons experienced in medical licensure and competent

---

State Medical Association, Montana Medical Association, Nebraska Medical Association, Nevada State Medical Association, New Hampshire Medical Society, Medical Society of New Jersey, New Mexico Medical Society, Medical Society of the State of New York, North Carolina Medical Society, North Dakota Medical Association, Ohio State Medical Association, Oklahoma State Medical Association, Oregon Medical Association, Pennsylvania Medical Society, Rhode Island Medical Society, South Carolina Medical Association, South Dakota State Medical Association, Vermont State Medical Society, Medical Society of Virginia, Washington State Medical Association, State Medical Society of Wisconsin, and Wyoming Medical Society.

> to make judgments about physician competence. It is recommended that decisions concerning medical competence and discipline be made with the participation of physician members of the board.

AMA Policy H-275.978(8). MAG endorses this policy in its entirety.

In keeping with the position long advocated by the AMA and MAG, Georgia and the other states have legislatively adopted criteria, mechanisms and safeguards by which experts in the field make licensure decisions for the protection of patients, the public and physicians. The Eleventh Circuit, departing from the holding of other Circuits, authorized the federal government to override licensure decisions by state medical boards, and unconstitutionally expanded the scope of federal power over medical licensure, thus opening the door to further intrusions.

It is the experience of the AMA and MAG that the system that requires a board consisting primarily of physicians to decide who should be allowed to practice medicine provides the best protection to patients, the public and physicians. Perhaps more importantly, states, including Georgia, have made the legislative judgment that a board consisting primarily of physicians is best equipped to make medical licensure decisions. This was a valid exercise of their police power to regulate the practice of medicine. The AMA and MAG have an interest in preserving from an unconstitutional invasion by the federal government a state licensure system that has worked well and provides important safeguards.

SUMMARY OF THE ARGUMENT

The Petition for Certiorari should be granted to resolve a split in the Circuits and to prevent the unconstitutional expansion of federal authority into state licensure of physicians. The forfeiture to the federal government of a state-issued medical license violates the Tenth Amendment.

The states have the police power to control medical licensing. They have exercised that power to establish rules and procedures for physician discipline and license revocation. Under Georgia law, the conviction of a felony does not automatically result in the loss of a medical license. The Georgia Composite Board of Medical Examiners ("the Georgia Medical Board") has the discretion to evaluate the facts underlying a conviction and, on behalf of the state in the exercise of its police powers, to decide to revoke, suspend or limit a medical license, or to leave it intact and in force.

The federal forfeiture of a state-issued medical license interferes with the power of the state to control medical licensing. The federal government admitted here that it was seeking forfeiture because of a concern that the Georgia Medical Board might not agree that Dr. Dicter should lose the privilege to practice medicine in Georgia, and might decide to allow him to practice medicine after his term of incarceration ended. Thus, the federal government admittedly was seeking to substitute its judgment for that of the agency charged by the state legislature with regulation of the practice of medicine.

Even without such an admission, the act of forfeiting a medical license in a federal proceeding rather than allowing the state agency charged with making the licensure decision to exercise its decisionmaking authority is an unwarranted and unconstitutional interference with the state's power to regulate the practice of medicine.

The Eleventh Circuit held that the federal forfeiture of Dr. Dicter's state medical license did not infringe upon the decisionmaking power of the Georgia Medical Board because if the Georgia Medical Board disagreed with the action, the Board could simply issue a **new** license to Dr. Dicter. The Eleventh Circuit further held that the decision as to whether to issue a new license was a matter "solely" of state law.

The Eleventh Circuit's recognition that the Georgia Medical Board could issue a new license to Dr. Dicter, and the acknowledgement that federal law plays no role in that state decision, proves the point that licensure of a physician is exclusively a state matter. The holding that it is solely a matter of state law whether to give Dr. Dicter a new license after forfeiture to the federal government illustrates that the real decision as to licensure belongs to the state and is outside the scope of the powers of the federal government. The Eleventh Circuit erred in holding the forfeiture of Dr. Dicter did not violate federalism concerns.

The Eleventh Circuit also erred in its holding that the state medical license constituted property for purposes of the forfeiture statute. The Eleventh Circuit relied upon decisions dealing with whether there was a property interest in a license so as to require due process before revocation. The Eleventh Circuit ignored Georgia caselaw establishing that the license itself is not property.

ARGUMENT

I. FEDERAL INTERVENTION IN STATE MEDICAL LICENSING DECISIONS VIOLATES THE TENTH AMENDMENT.

The Petition for Certiorari should be granted to resolve a split in the Circuits and to prevent the unconstitutional expansion of federal authority into state licensure of physicians. The nature of that split is described in

detail in the Petition for Writ of Certiorari, filed with this Court by Richard M. Dicter, M.D. The forfeiture to the federal government of a state-issued medical license violates the Tenth Amendment.

A. The Regulation of Medical Licensing is a Sovereign Power Traditionally Reserved to the States.

Georgia, like every state, possesses the police power to control medical licensing of its physicians. As this Court recently held, "the Constitution reserves the general police power to the States." *United States v. Morrison*, 120 S.Ct. 1740, 1754 n. 8 (2000). Ample prior authority makes it clear that one of the sovereign police powers traditionally exercised by the states and reserved to the states by the Tenth Amendment is control over the practice of medicine. The state's sovereign power in this area was recognized by this Court as early as 1925 in *Linder v. United States*, 268 U.S. 5, 18 (1925), when it held, "[o]bviously, direct control of medical practice in the states is beyond the power of the Federal government." More recently, in *Pegram v. Herdrich*, 120 S.Ct. 2143, 2158 (2000), the Court held that "the field of health care [is] a subject of traditional state regulation." *See Barsky v. Board of Regents*, 347 U.S. 442, 449 (1954) ("It is elemental that a state has broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there"); *id.* at 449 ("The state's discretion in that field extends naturally to the regulation of all professions concerned with health"); *Yeargin v. Hamilton Memorial Hosp.*, 171 S.E.2d 136, 139 (Ga. 1969) ("the preservation of public health is one of the duties devolving on the state as the sovereign power, and the discharge of this duty is accomplished by means of the exercise of the inherent police power of the sovereign . . . it is perfectly clear that the state may interfere with the right of the individual

and place restrictions and regulations on the practice of medicine."); *Hughes v. State Board*, 134 S.E. 42, 46 (Ga. 1926) (same); *Bhan v. NME Hospitals, Inc.*, 669 F. Supp. 998, 1003 (E.D.Cal. 1987) (licensing of medical professionals is a matter within the state's police power); *Szeto v. Louisiana State Bd. of Dentistry*, 508 F. Supp. 268, 271 (E.D. La. 1981) (states enjoy a police power to regulate the medical profession in any manner consistent with the United States Constitution).

The state's sovereign power of medical licensing extends beyond the initial grant of a license and includes the establishment of standards of conduct and practice, discipline, license suspension or revocation. *See, e.g., Barsky*, 347 U.S. at 451 ("a state's legitimate concern for maintaining high standards of professional conduct extends beyond initial licensing").

B. The States, Including Georgia, Have Enacted Regimes for the Grant, Denial, Suspension or Revocation of Medical Licenses by Appointed or Elected Boards of Physicians Applying Factors and Standards Adopted by the State Legislatures.

Like every other state, Georgia has adopted a complex regulatory scheme governing the practice of medicine and the grant, denial, revocation or suspension of medical licenses, and the discipline of physicians. *See* O.C.G.A. §§ 43-34-1 through 43-34-46 (1999) (statutes governing practice of medicine, creation of Georgia Medical Board, and licensure of physicians); Rules and Regulations of the State of Georgia, 360-2-.01 through 360-15-.02 (1999) (regulations governing Georgia Medical Board and medical licensure).

In Georgia, twelve of thirteen members of the Georgia Medical Board are required by statute to be physicians. O.C.G.A. § 43-34-21(b). This is consistent with the AMA policy described above. All members of the Georgia

Medical Board are appointed by the Governor and confirmed by the State Senate. O.C.G.A. § 43-34-21(a).

Under the state regulatory regime, a medical license may be suspended or revoked by the Georgia Medical Board based upon conviction of a felony. O.C.G.A. § 43-34-37(a)(3). Other "offenses" which may lead to suspension or revocation of a license by the Georgia Medical Board include, *inter alia*, failure to maintain appropriate records of prescriptions for Schedule II drugs (Rules and Regulations of the State of Georgia, 360-2-.09(d)); "prescribing drugs for a habitual user in the absence of substantial medical justification," (*id.*, 360-2-.09(e)); "repeated prescribing of controlled drugs for personal or family use," (*id.*, 360-2-.09(g)); and, violating the Georgia or Federal Controlled Substances Act (*id.*, 360-2-.09(k)).

C. Forfeiture Upon Conviction of a Crime Without a Hearing Before a Panel of Physicians Is Contrary to the State Regulatory Scheme.

Under Georgia law, the conviction of a felony, even a violation of the Controlled Substances Act, or writing illegal prescriptions, does not give rise to automatic license revocation. That law is consistent with the due process rights recognized in *Rehman v. California*, 85 S.Ct. 8, 9 (1964), in which Justice Douglas held that a separate hearing, considering factors other than those involved in the criminal case, is required before revocation of a medical license.

> A doctor might well go to prison for a misdeed in connection with his practice and yet not automatically lose his right to practice medicine. Deprivation of a professional license should require a hearing, since broader issues than those in the criminal case are involved, e.g., whether the misdeed is of a character to

> make it unsafe and improvident for the State to entrust a medical license to that person.

Rehman v. California, 85 S.Ct. 8, 9 (1964) (emphasis added).

Consistent with this due process requirement and pursuant to its power to regulate the practice of medicine, the Georgia legislature has adopted a system whereby the Georgia Medical Board, consisting of expert physicians, is to investigate, hold a hearing and then choose from the following penalties for any of the offenses that may lead to license revocation:

> (A) Refuse to grant a license to an applicant;
> (B) Administer a public or private reprimand, provided that a private reprimand shall not be disclosed to any person except the licensee;
> (C) Suspend any license for a definite period;
> (D) Limit or restrict any license [including restrictions preventing the physician from prescribing any or all drugs];
> (E) Revoke any license; or
> (F) Condition the penalty, or withold [sic] formal disposition, upon the physician's submission to the care, counseling, or treatment of physicians or other professional persons, and the completion of such care, counseling, or treatment, as directed by the Board.

O.C.G.A. § 43-34-37(b)(1). The Georgia Medical Board can also place a physician upon probation. O.C.G.A. § 43-34-37(b)(2).

Although perhaps irrelevant to a constitutional analysis, the reasonableness of the options other than license revocation and evidence that the Georgia Medical Board might have chosen a sanction other than revocation is demonstrated by the actions of the jury. The jury in this case asked the District Court if, rather than forfeiting his license, Dr. Dicter could keep his license subject to probation and monitoring by the Board and limited to disallow

prescription writing privileges; or, whether his license could be suspended rather than forfeited. A.24a. All of those options were open to the Georgia Medical Board under O.C.G.A. § 43-34-37(b). Compounding the error of depriving the Georgia Medical Board of its statutory and constitutional right and duty to consider those lesser penalties, the District Court also deprived the jury of those options by instructing the jury that the issue for its consideration was whether the medical license facilitated the crime and by refusing to allow instruction on any of the penalties less than forfeiture. A.21a-23a. The jury, deprived of any other option, held that the license facilitated the crime, and thus forfeiture was imposed by the District Court. Thus, the District Court not only usurped the role of the Georgia Medical Board, but it affirmatively prevented the consideration of the "broader issues" held in *Rehman* to be required by due process and of the lesser penalties adopted by the Georgia legislature in the exercise of its police power to regulate the practice of medicine.

Of course, any act by a physician in writing illegal prescriptions is surely "facilitated" by the physician's medical license. Under the District Court's instruction, forfeiture is essentially automatic. However, automatic forfeiture of a medical license as a result of a conviction for writing illegal prescriptions is inconsistent with the Georgia statutory scheme allowing the decision as to licensure after such a conviction to be made by the physicians on the Georgia Board, and providing a number of options other than revocation. Automatic forfeiture is also inconsistent with the holding in *Rehman*.

D. Forfeiture Allows the Prosecutor, Jury and Trial Judge to Substitute Their Judgment for That of the Medical Professionals Designated by the State.

There is no doubt that the forfeiture of a state-issued medical license interferes with the power of the state to

control medical licensing. At the time of Dr. Dicter's trial, the Georgia Medical Board was investigating Dr. Dicter's practice. (R4-3-13). In fact, the federal government expressly admitted here that it was seeking forfeiture because of a concern that the Georgia Medical Board might not agree that Dr. Dicter should lose the privilege to practice medicine in Georgia, and might decide to allow him to practice medicine after his term of incarceration ended. As the government told the district court, "[t]here is no guarantee the Board would take the license or wouldn't give it back at some point."(R14A-10). Thus, the federal government has admitted that in seeking forfeiture it was seeking to substitute its judgment for that of the state agency charged with enforcing the state police power of regulation of the practice of medicine.

Even without such an admission, the mere act of forfeiting a medical license in a federal proceeding rather than allowing the state agency charged with making the licensure decision to exercise its decisionmaking authority is an unwarranted and unconstitutional interference with the state's power to regulate the practice of medicine. *Linder*, 268 U.S. at 18 ("control of medical practice in the States is beyond the power of the Federal Government."); *Morrison*, 120 S.Ct. at 1754 n. 8 ("the principle that 'the Constitution created a Federal Government of limited powers' while reserving a generalized police power to the States is deeply ingrained in our constitutional history.") Certainly the offenses for which Dr. Dicter was convicted justified the imposition of sanctions against his license. But, "under our federal system that remedy must be provided by the [state], and not by the United States." *Morrison*, 120 S.Ct. at 1759.

E. The State's Ability to Issue a New License Immediately After Forfeiture Demonstrates That Control Over Licensure Belongs to the State.

The Eleventh Circuit held that forfeiture of Dr. Dicter's state medical license was not an infringement upon the decisionmaking power of the Georgia Medical Board because if the Georgia Medical Board disagreed with the action, the Georgia Medical Board could simply issue a new license to Dr. Dicter. The Eleventh Circuit further held that the decision as to whether to issue a new license was solely a matter of state law:

> The State of Georgia has a powerful interest in controlling the licensing of physicians practicing in Georgia. Nonetheless, we do not see how the forfeiture of Defendant's medical license prohibits the state licensing board from regulating Defendant's practice of medicine in Georgia. The district court simply ordered the forfeiture of a definite thing, a *particular* medical license: the medical license held by Defendant and "issued by the Georgia Composite Board of Medical Examiners." The district court's order of forfeiture does not purport to forfeit any other medical license, including one that might be issued to Defendant by the Georgia medical licensing board in the future.
>
> Furthermore, Defendant's license was forfeited on the ground that it was "used . . . to facilitate the commission of" Defendant's unlawful distribution of controlled substances from 1992 through 1994. *See* 21 U.S.C. § 853(2). Any license that might be issued in the future (but has not yet been issued, and certainly was not in existence between 1992 and 1994) could not have facilitated the Defendant's unlawful distribution of controlled substances. Therefore, any such

> future license was not forfeited to the United States. **Whether the Georgia medical licensing board is authorized to issue another, *different medical license* to Defendant in the future is an issue solely of Georgia law.** [footnote omitted] **The Georgia board's power is unaffected by this forfeiture.** Defendant's Tenth Amendment contention, therefore, lacks merit.

United States v. Dicter, 198 F.3d 1284, 1291-92 (11th Cir. Ga. 1999) (emphasis added).

The Eleventh Circuit's recognition that the Georgia Medical Board could issue a new license to Dr. Dicter, and the acknowledgement that federal law plays no role in that state decision, proves the point that licensure of a physician is exclusively a state matter. The holding that it is solely a matter of state law whether to give Dr. Dicter a new license after forfeiture to the federal government illustrates that the real decision as to licensure belongs to the state and is outside the scope of the powers of the federal government.[3] The Eleventh Circuit erred in holding the forfeiture of Dr. Dicter's license did not violate federalism concerns.

---

[3] The Eleventh Circuit's discussion of this issue also demonstrates another error in its analysis. The Court held that the order of forfeiture did not impact the state's authority to issue a new license, and repeatedly held that the forfeiture was limited to "a *particular* medical license," the one that was "in existence between 1992 and 1994," 198 F.3d at 1291 (emphasis in original), because the offenses occurred between February 1992 and early 1994. The Court also noted that licenses issued by the Georgia Composite Board "shall be valid for up to two years." 198 F.3d at 1292 n. 10 (*quoting* O.C.G.A. § 43-34-24.1(d)). Unfortunately for the Eleventh Circuit's analysis, the forfeiture occurred on November 16, 1996 – more than two years after the last offense. Thus, the forfeited license could not have been the license in existence at the time of the offenses, rendering the forfeiture invalid under the Eleventh Circuit's own analysis.

F. If the Federal Government Can Constitutionally Impose Revocation of a License, It Could Grant a License or Overrule the Grant of a License.

Justice Thomas has warned of "Congress appropriating state police powers under the guise of regulating commerce." *Morrison*, 120 S.Ct. at 1759 (Thomas, J., concurring). If Congress intended the forfeiture statute to encompass the forfeiture of state medical licenses, then Justice Thomas's warning is prophetic indeed. For if Congress can pass a statute that allows the federal government to override a decision not to revoke a license, then it can pass a statute that allows the federal government to override a decision to grant or deny a medical license. The federal government would be free to appropriate from the states the police power to regulate medical practice and grant and deny medical licenses. Such a result would be utterly repugnant to the "deeply ingrained constitutional history" of state retention of general police powers, and of the power to regulate health and medical matters in particular. *Morrison*, 120 S.Ct. 15 1754 n. 8.

G. The Forfeiture of a Medical License Constitutes Unconstitutional Regulation of the Action of the State Medical Board.

As this Court held in *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997), the federal government may not regulate the actions of the executive branches of state governments. "The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Printz*, 521 U.S. at 935.

Sustaining the federal government's forfeiture of a state-issued medical license would, in effect, command the state Medical Board, a part of the state executive branch, to refrain from exercising its power to regulate medicine. It would prevent the Medical Board from considering, as is its statutory charge, the appropriate sanction for the conduct of the offending physician. It would result in regulation of the Medical Board, a state executive agency. *See New York*, 505 U.S. at 166 ("The Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States").

Further, under the Georgia statutory scheme, federal forfeiture would also command the Georgia Medical Board to take **affirmative** action, a commandment prohibited by *Printz*, 521 U.S. at 935 (federal government cannot "issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions"), **and to pay** for the "privilege" of doing the bidding of the federal government. *See Printz*, 521 U.S. at 930 (state executive branch cannot be required to absorb the cost of enforcing federal laws).

Under O.C.G.A. § 43-34-36, all medical licenses are registered with the Superior Court of the county in which the physician resides. When a physician loses a license, the Georgia Medical Board is required to notify the Superior Court of the county of the physician's residence of the loss of the license, provide a copy of the order pursuant to which the license was lost, **and pay a recording fee to record the order**. O.C.G.A. § 43-34-39.

The quantity of the burden imposed upon the state executive branch in receiving the order from the District Court, delivering a copy to the Clerk of the Superior Court, and paying a filing fee, is irrelevant under this Court's analysis in *Printz*. This Court held that the forced utilization of "one-half hour of an officer's time" to conduct background checks could be too great an imposition, *Printz*, 521 U.S. at 927-28, and that forcing a state law

enforcement officer to "receive" a request for a background check crossed the federalism line. Here, the Georgia Medical Board is forced to receive, copy and deliver the District Court's Order, and to pay a fee. Even "requiring state officers to perform discrete, ministerial tasks" violates the Tenth Amendment. *Id.* at 929. The imposition of these restrictions and burdens upon the Georgia Medical Board as a result of the forfeiture renders the forfeiture violative of the Tenth Amendment.

H. In Other Contexts, Federal Courts Have Forbidden Federal Interference with the States' Licensing of Professionals.

In various contexts, the federal courts have held that the federal government cannot interfere with the state granted licenses, particularly licensing of professionals. Many of the cases involve the states' licensure, pursuant to their police power, of attorneys. For example, in *United States v. Polk*, 556 F.2d 803, 804 (6th Cir. Tenn. 1977), *cert. denied*, 434 U.S. 862 (1977), the court **reversed** a district court's requirement that the defendant **forfeit** his license to practice law as a condition of probation, holding that the court's authority over the defendant "does not govern the State's licensing of its legal practitioners but is solely concerned with appellant's conduct during the term of the sentence involved."

The licensure of professionals is peculiarly a matter for the states, not the federal government, and this Court has held that it had "no authority to re-examine or reverse as a reviewing court the action of the Supreme Court of Michigan in disbarring a member of the Bar of the courts of that State for personal and professional misconduct." *Selling v. Radford*, 243 U.S. 46 (1917). *See United States v. Martinez*, 988 F. Supp. 975, 977 (E.D. Va. 1998) and *United States v. Pastore*, 537 F.2d 675, 681-82 (2d Cir. 1976) (acknowledging that "New York State has

exclusive jurisdiction over admission to, and removal from, the bar"); *Ginger v. Wayne County Circuit Court*, 372 F.2d 621, 625 (6th Cir. 1967) ("[T]he courts of the State of Michigan have exclusive jurisdiction over the admission of attorneys, the regulation of the practice of law, and the discipline and disbarment of attorneys, so far as the practice of law in the state courts is concerned."); *Gately v. Sutton*, 310 F.2d 107, 108 (10th Cir. 1962) ("The Supreme Court of Colorado has exclusive jurisdiction to admit attorneys to practice in the Colorado courts and to strike them from the roll for misconduct.")

Although a federal court may disbar an attorney from practice before that court, it lacks the constitutional power to revoke an attorney's **state** bar license. *See, e.g., In re Cook*, 49 F.3d 263 (7th Cir. Ill. 1995) (barring an attorney from practice in the Seventh Circuit's bar based on federal district judge's findings of ethical impropriety, but not disturbing the judgment of the state court ignoring the federal district court findings); *Sutherland v. Whetstone*, 1991 U.S. Dist. LEXIS 6946 (S.D. Ala. Feb. 22, 1991) ("[t]he federal court does not disbar lawyers from practicing in Alabama.").

That the federal courts have no authority to revoke or suspend state-issued licenses is not a new concept, nor is it limited to professionals. *See United States v. Snyder*, 852 F.2d 471, 474-475 (9th Cir. Cal. 1988) (no federal authority to revoke state-issued driver's license) (emphasis added), *quoting, United States v. Best*, 573 F.2d 1095 (9th Cir. Cal. 1978):

> [W]hile noting that a federal court had the power to limit a defendant's driving privileges within federal enclaves and to notify the DMV of a conviction, we held that the **federal courts could not directly suspend a state license, because this would violate fundamental principles of federalism.**

> "Where not required for protection of the federal interest, [a federal court] may neither suspend a state driver's license nor order the state to do so, any more than it could dissolve a state-chartered corporation in federal court warrant proceedings or sentence criminals convicted in federal courts to terms in the state prison." **Driver's licenses are issued pursuant to the states' police powers, and the federal government has no constitutional authority to interfere with a state's exercise of its police power** except to the extent the state's action intrudes on any of the spheres within the federal government itself enjoys the power to regulate.

(emphasis added).

In *United States v. Stenzel*, 1993 WL 276116 (N.D. Ill. 1993), a district court addressed a defendant's motion to modify conditions of probation which prohibited the defendant from acting as a tax preparer or real estate agent during the term of probation. The *Stenzel* court affirmed the condition, holding that "because Stenzel has not been required to forfeit or surrender any professional licenses, the challenged restrictions do not improperly bypass the state's professional regulatory mechanisms and procedures." *Id.* (emphasis added). The forfeiture of Dr. Dicter's medical license does improperly bypass the state's professional regulatory mechanisms and procedures. It is unconstitutional.

II. A STATE-ISSUED MEDICAL LICENSE IS NOT "PROPERTY" FOR FORFEITURE PURPOSES.

The Eleventh Circuit also erred in its holding that the state medical license constituted property for purposes of the forfeiture statute. The Eleventh Circuit held that the issue of whether a medical license was "property" subject to forfeiture was "confirmed by Georgia law," and cited prior Eleventh Circuit authority for the proposition that courts should look to state law to determine whether a

license is "property." 198 F.3d at 1290. The Eleventh Circuit, however, focused on the wrong body of state law.

Georgia medical licenses, though property for due process considerations, are not property for other purposes. In *Lowery v. Lowery*, 262 Ga. 20, 21, 413 S.E.2d 731, 732 (Ga. 1992), the Georgia Supreme Court held that medical licenses "bear no similarity to even the broadest view of property for purposes of equitable distribution. Their value is too speculative to calculate . . . [They have] no exchange value or transferable value in an open market, are personal to [the physician], terminate on his death, and cannot be assigned, sold, transferred or pledged." The Eleventh Circuit did not cite *Lowery*. Instead, it relied upon two older Georgia cases which held that a professional has a due process right to a hearing before the licensing board before revocation of a license (*Leakey v. Georgia Real Estate Comm.*, 55 S.E.2d 818, 819 (Ga. App. 1949)); and that "the right to practice medicine is . . . a valuable property right." (*Yeargin v. Hamilton Memorial Hosp.*, 171 S.E.2d 136, 139 (Ga. 1969)). Of course, a hearing before the licensing board as required by *Leakey* is exactly the protection of which the lower courts here **deprived** Dr. Dicter. And, the "valuable property right" at issue in *Yeargin* was hospital privileges, not a license to practice medicine.

Nonetheless, the AMA and MAG do not contend that a medical license is not a property right for purposes of a due process analysis. It clearly is. But, the Georgia courts have recognized a distinction between labeling a license "property" for due process purposes and for any other purpose. *See Lowery*, 413 S.E.2d at 732 (medical license is not property). The Eleventh Circuit simply relied upon the wrong body of state law.

CONCLUSION

For the foregoing reasons, the *amici curiae* respectfully pray that the Court grant the Petition for Certiorari

and reverse the decision of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

EMMET J. BONDURANT*
MICHAEL B. TERRY
BONDURANT, MIXSON & ELMORE, LLP
1201 W. Peachtree Street, N.W.
3900 One Atlantic Center
Atlanta, Georgia 30309-3417
(404) 881-4100

PAUL L. SHANOR, II
DAVID A. COOK
WILLIAM T. CLARK
Medical Assoc. of Georgia
1330 West Peachtree Street
Suite 500
Atlanta, Georgia 30309
(404) 881-5040

MICHAEL L. ILE
ANNE M. MURPHY
LEONARD A. NELSON
CAROLYN QUINN
American Medical Association
515 N. State Street
Chicago, Illinois 60610
(312) 464-5532

Counsel of Record